83-2016

No. .....

In The

Supreme Court of the United States

October Term, 1983

—o—

CLEO LUTER,

Petitioner,

vs.

STATE OF IOWA,

Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

—o—

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the federal constitutional rights of the Petitioner to a fair trial, compulsory process, and due process of law were violated by the trial Court's refusal to order the disclosure of the identity of an individual who was a *res gestae* witness under law of the case as well as the source of statements upon which a confidential informant relied in supplying information leading to the issuance of warrants challenged by the Petitioner.

2. Whether the federal constitutional rights of the Petitioner to be secured against unreasonable searches and seizures and to have no warrant issue but upon probable cause was violated by two warrants issued by the Honorable John F. Siebenmann, an associate judge of the Iowa District Court, Linn County, Iowa on the 23rd day of February, 1982.

3. Whether the federal constitutional rights of the Petitioner to due process of law were violated by the convictions of the Petitioner for the offenses of Possession with Intent to Deliver Heroin and Possession with Intent to Deliver Cocaine on the basis of evidence insufficient to support the convictions.

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No. .....

In The

Supreme Court of the United States

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CLEO LUTER,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Iowa, entered on the 10th day of May, 1984, in the case entitled "State of Iowa, Appellee, v. Cleo Luter, Appellant."

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of the State of Iowa, printed in Appendix B, hereto, *infra,* pp. A2-A25, is reported in 346 N.W.2d 802 (Iowa 1984).

———o———

JURISDICTION

The opinion of the Supreme Court of the State of Iowa was entered on March 14, 1984. A request for a rehearing was made on April 16, 1984, and the Petition for Rehearing was denied on May 10, 1984. This petition for Certiorari was filed within 60 days of May 10, 1984, the date upon which the Supreme Court of the State of Iowa filed the denial of the Petition for Rehearing. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3).

———o———

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The federal constitutional provisions involved are the following, and are printed in Appendix A hereto at page A1 *infra*:

1. Amendment 4, of the United States Constitution.
2. Amendment 6, of the United States Constitution.
3. Amendment 14, Section I of the United States Constitution.

STATEMENT OF THE CASE

On the 17th day of March, 1982, a Trial Information was filed in the District Court of Linn County, Iowa accusing the Petitioner of the crime of Possession of Heroin and Cocaine with Intent to Deliver and Possession of a Firearm as a Felon. The Petitioner entered pleas of not guilty to each charge and filed pretrial motions which sought to suppress evidence seized pursuant to two search warrants and to compel disclosure of a *res gestae* witness, an informant. These motions, both written and oral, and relevant portions of the attendant proceedings are found in Appendices I, J, and K, pp. A48 - A63.

Petitioner's motions were overruled and the Petitioner was tried and found guilty of all charges by a jury verdict returned on the 19th day of November, 1982.

On the 12th day of January, 1983, the Honorable Thomas M. Horan, a Judge of the Sixth Judicial District of Iowa, sentenced the Petitioner to ten years on each of the two counts of Possession with Intent to Deliver and to two years on the charge of Possession of a Firearm as a Felon. All sentences were ordered to be served concurrently.

On the 13th day of January, 1983, the Petitioner appealed from the final judgment and sentence of the Iowa District Court to the Supreme Court of Iowa.

On the 14th day of March, 1983, the Supreme Court of Iowa affirmed the Petitioner's conviction and subsequently denied his Motion for Rehearing on May 10, 1984. Appendices B and C, pp. A2 - A26.

ISSUE I

Argument

On February 21, 1984, the Supreme Court of the United States dismissed a Writ of Certiorari improvidently granted *Colorado v. Nunez,* — U.S. —, 79 L.Ed.2d 338, 104 S.Ct. — (1984). This case presents an issue identical to that which was accepted by this Court in *Nunez,* the disclosure of the identity of an informant.

In the instant case, the Petitioner made a showing that an unknown and undisclosed informant/drug user was the only person alleged to have made the observations upon which two search warrants were based. Although the undisclosed informant/drug user had a self-impeaching characteristic, that of being a drug user, the reliability of this informant was not addressed in either of the Information for Search Warrant forms filed in support of the request for warrants. Appendix D, pp. A27 - A33 and Appendix F, pp. A37 - A43. The reliability of the informant/drug user was not certified by the magistrate. Petitioner requested disclosure of the informant/drug user's identity on the grounds that the informant could provide information essential to the merits of his suppression motion and upon the basis that, since the informant had purportedly been inside the home of the Petitioner, there was a reasonable basis to believe that the informant was a likely source of relevant and helpful evidence on the question of the degree of the Petitioner's criminal culpability and that the undisclosed informant could provide evidence to support the Petitioner's contention that he possessed the drugs for his own use. In the instant case, the request for disclosure was not made on

State grounds, but pursuant to the 4th, 6th and 14th Amendments to the U.S. Constitution. Petitioner asserted that disclosure of the informant/drug user's identity was required to assure a full and fair litigation of the search warrant claim and to assure a fair assessment of his criminality by a jury at trial.

The Petitioner's arguments were rejected by the trial Court.

Petitioner's request for disclosure of the identity of the informant/drug user was strengthened by the finding of the Iowa Supreme Court that the mere possession of paraphernalia which could be used for drug trafficking constituted on act from which an intent to transfer drugs could be inferred. Under the law of this case, the informant/drug user became a *res gestae* witness, for he was purportedly in a position to see if or how the paraphernalia was used by the Petitioner during the time the offenses were alleged to have been committed.

Since the Petitioner's defense against charges of possession with intent to deliver a controlled substance was his testimony that the substances and paraphernalia were intended for his own use, the informant/drug user was a witness who could support the Petitioner's defense, as well as provide information relevant to his 4th Amendment claim. *Roviaro v. United States,* 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957).

Several members of this Court indicated that the *Nunez* decision was in conflict with what they believed to be the applicable federal constitutional standards. The present case provides an opportunity for this Court to decide an important question of federal law so that State

courts may have additional guidance in their attempt to apply federal constitutional standards to this recurring issue.

ISSUE II

Argument

In his appeal to the Supreme Court of Iowa, Petitioner challenged, *inter alia,* (1) the absence of probable cause for the issuance of warrants for the search of the Petitioner, his house, or a car driven by him, and (2) the absence of probable cause for either of the two warrants issued once false statements made to the issuing magistrate were excised.

One of the warrants was directed against a 1979 Lincoln Versailles, registered to the mother of the Petitioner, and the other was issued for the Petitioner and his residence. The information submitted to the issuing magistrate was the same for both warrants and both requests were considered at the same time, 8:37 p.m., February 23, 1982. Both warrants were issued at 8:48 p.m. on that same date.

Little effort was made to provide facts sufficient to support the search of the automobile. Paragraph 12 of each affidavit submitted to the magistrate states that the vehicle was parked in an alley beside the Petitioner's residence during the time that comments made by an unidentified "drug user" to an informant caused a State agent to infer that heroin had been purchased at the Petitioner's residence. A "known heroin user" was overheard telling the State's informant that the Petitioner "had some good dope", but neither the officer seeking the warrant nor the informant could say whether the "user" had heroin

before he entered the premises, whether the "user" entered the Petitioner's house, or whether the Petitioner or his mother were on the premises. Further, not one word was offered to assist the magistrate in assessing the "user's" reliability.

Whatever happened, no effort was made to provide factual data sufficient to tie the vehicle to any illegal activity. Only Paragraph 14 of the affidavit even addresses the problem, and it does so in completely conclusory terms. None of the information allegedly available to the Cedar Rapids Police Department was shared with the issuing magistrate.

The opinion of the Iowa Supreme Court assumed that the seizure of two canisters resulted from the warrant issued for the Lincoln registered to the Petitioner's mother. The contents of the canisters, which were offered against the Petitioner at trial, consisted of five grams of powder with a heroin content of .035% of the five grams and another five grams of powder, .013% of which was cocaine. In upholding the search of the vehicle under *Illinois v. Gates*, — U.S. —, 103 S.Ct. 2317, 76 L.Ed.2d 527, *rehearing denied*, — U.S. —, 104 S.Ct. 33, 77 L.Ed.2d 1453 (1983), the Iowa Supreme Court found that the issuing magistrate could reasonably infer from the recital on the affidavit that drug transactions had taken place at both the Petitioner's house and at his business, Player's Palace. Such a finding not only accorded the statements of an unknown "drug user" full credit but, more importantly, ignored the fact that no time reference whatsoever was provided the magistrate by anyone regarding any alleged drug transaction at the Petitioner's business, Player's Palace.

A warrant cannot be issued on grounds that, at some past time, contraband was seen at that location. *Sgro v. United States,* 287 U.S. 206, 53 S.Ct. 138, 77 L.Ed. 260 (1932). The magistrate had no evidence before him that transactions had taken place at both locations in the recent past, nor did he have evidence of a recent or continuing series of sales at Player's Palace. The magistrate had before him only the bare assertion that drugs were to be found in the vehicle belonging to the Petitioner's mother. *Illinois v. Gates, supra,* requires a "fair probability that contraband or evidence of a crime will be found at a particular place." Petitioner asserts that a statement from an unknown "drug user" about an alleged transaction at an unspecified time does not lead to a fair probability that drugs were in the car belonging to the Petitioner's mother on the date the warrant was issued.

The opinion of the Iowa Supreme Court goes beyond any "common sense" approach and sanctions a warrant issued on the basis of conjecture. The magistrate lacked a substantial basis for the issuance of a warrant for the vehicle seized herein. The evidence obtained should be suppressed under the protection afforded the Petitioner by the 4th and 14th Amendments to the U.S. Constitution.

The Affiant's refusal to disclose to the magistrate that the drug user "was purportedly the only person inside the residence of the Defendant, and the only individual to observe dope" led to a misconception on the part of the magistrate that the individual actually identified as an informant was the person who made the observation inside the house upon which the Affiant relied for the issuance of the search warrants. The Affiant, an experienced State officer, knew or should have known that his failure to

make an express disclosure of the source of his information constituted a reckless disregard for the truth because the informant was the only person certified as reliable by the magistrate.

The reliability of the drug user was not addressed by the magistrate. Petitioner contends that the Affiant made a critical omission and that the conduct of the Affiant violated this Court's holding in *Franks v. Delaware,* 438 U.S. 154, 98 S.Ct. 2675, 57 L.Ed.2d 667 (1978).

Petitioner further contends that the statements made in the Informations for Search Warrants led to a misconception on the part of the issuing magitrate. Although the Supreme Court of Iowa believed that such an allegation gave insufficient credit to the issuing magistrate, the objective facts decided by the issuing magistrate himself squarely support the Petitioner's position.

The Information forms provided the magistrate were designed to provide a complete record of the grounds for the issuance of a warrant. Included in the document is a paragraph where the issuing magistrate is to certify that the grounds for issuing the warrant were furnished by an informant and that *the informant had previously given reliable information.* In the instant case, no information whatsoever is provided regarding the "drug user" who makes the observations allegedly leading to a finding of probable cause, only the reliability of an informant who talks to the "drug user" is discussed. Yet the issuing magistrate certifies that he has issued the warrant on the basis of information provided by *an informant* who had *previously given reliable information.* Petitioner suggests that the Court is giving insufficient credit to the issuing

judge in assuming, contrary to his certified statements, that he did not know how to indicate which of the individuals he was relying upon. The issuing judge could certainly read the certified statement which he completed and signed and, in doing so, would have read that the grounds for the warrant were provided by an informant who previously gave reliable information and not an unknown, undescribed, "drug user" of unknown reliability and unknown motives.

The Court cannot go beyond the information to speculate about what the magistrate meant. His written certification demonstrates apparent confusion. The judge, who was operating under a rule which made it important to establish the reliability of an informant, fails to make any finding about the reliability of the "drug user" whose statements provide the sole opportunity to establish probable cause and, instead, relies on an informant whose information cannot provide probable cause for the issuing of a warrant.

The consequence of this misunderstanding should fall upon the Affiant, whose information contained no attempt to inform the judge about the reliability of the drug user and avoided disclosure of any information about a drug user with a self-impeaching habit. This procedure evaded the reliability requirement that the Affiants were obliged to meet.

The statements of the "drug user" should be excised and the remaining information reviewed under the *Gates* standard. Upon such review, the evidence seized should be suppressed.

ISSUE III

Argument

The Iowa Legislature did not create a strict liability possessory offense for a person in possession of controlled substances and drug paraphernalia, and impose a single penalty for such an offense. Rather, the Iowa Legislature created two distinct crimes regarding possession of controlled substances. For the conviction of the higher offense, a felony, the State of Iowa must prove beyond a reasonable doubt that a person possessed a controlled substance with the intent to deliver. (Chapter 204.401(1), 1981 Code of Iowa). At trial, the Petitioner admitted he was a drug user and possessed controlled substances for personal consumption. Simple possession is a serious misdemeanor. (Chapter 204.401(3), 1981 Code of Iowa). Petitioner contends that criminal law is concerned not only with guilt or innocence in the abstract but, also, with the degree of criminality. (*Mullaney v. Wilbur,* 421 U.S. 684, 697-698 (1974)). As charged in the Trial Information, the prosecution had the burden to prove the controlled substances in the possession of the accused were intended for delivery on or about February 25, 1982. The specific intent to deliver and the criminal act of possession must occur in point of time. (*Gay v. United States,* 408 F.2d 923, (8th Cir. 1969), cert. denied, 90 S.Ct. 65, 396 U.S. 823, 24 L.Ed.2d 74).

Petitioner contends that the evidence to show possession with intent to deliver heroin or cocaine was insufficient to satisfy the Due Process requirements of *Jackson v. Virginia,* 443 U.S. 307 (1979). Under the circumstances of the case, the State adduced no evidence of an

actual sale, no testimony of negotiations by the Petitioner with anyone else concerning a sale, no admission or confession by the accused that he intended the controlled substances for sale, nor was any evidence adduced by the prosecution to prove that any of the "extenders" or paraphernalia were actually used in the preparation for delivery, nor were they proven to be in a different form than when acquired by Petitioner from another person, nor were they proved to have been used by Petitioner at all.

The Iowa Supreme Court found that the jury could infer possession with intent to deliver from the sundry items found in Mr. Luter's home. But such an inference on its own, in view of other circumstances, cannot satisfy the *Jackson* test. The "extenders" were in pill form, and such "extenders" may be used in the preparation of a drug for personal use as well as delivery. The possession of paraphernalia alone, such as scales, finger cots, etc., constitutes neutral evidence as to simple possession or to possession with the intent to deliver unless the drugs or paraphernalia are shown by the State to be related to a drug sale or preparation for use in a drug sale. If paraphernalia may be used to prepare drugs for personal use or be used in "innocent" activities, and if packaging materials or film canisters may be used to carry drugs for personal use, the State of Iowa had the burden of proving beyond a reasonable doubt that the drugs and paraphernalia were not so used. The State of Iowa had the burden to adduce evidence to demonstrate that the "extenders" were used or intended to be used for preparation of a delivery; and/or that the "extenders" were acquired or purchased by Mr. Luter in a different form, and that

Mr. Luter had modified the "extenders" or actually used the paraphernalia in preparation of a delivery.

The Iowa Supreme Court also suggested that the Petitioner's attempt to discard canisters containing drugs constituted an act from which an attempt to transfer could be inferred. The appropriate inference would appear to be that the Petitioner knew the contents of the canisters were illegal. Further, no inference can be drawn from the existence of the canisters alone, for the evidence indicated they were commonly used to carry drugs, a practice which applies as readily to consumers as it does to sellers of contraband.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully prays that his Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

1. Amendment 4 of the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

2. Amendment 6 of the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

3. Amendment 14, Section 1 of the United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B

IN THE SUPREME COURT OF IOWA

50/83-45

STATE OF IOWA,

Appellee,

vs.

CLEO LUTER,

Appellant.

(Filed March 14, 1984)

Appeal from Iowa District Court for Linn County, Thomas M. Horan, Judge.

Appeal by defendant from conviction of possession of heroin with intent to deliver, possession of a firearm as a felon, and possession of cocaine with intent to deliver. AFFIRMED.

John M. Kinnamon and Jerald W. Kinnamon of Kinnamon, Kinnamon, Russo & Meyer, Cedar Rapids, and Walter D. Braud and Anthony Jamison of Braud, Warner, Neppl & Westencee, Ltd., Rock Island, Illinois, for appellant.

Thomas J. Miller, Attorney General, Mary Jane Blink, Assistant Attorney General, and Denver D. Dillard, County Attorney, for appellee.

Considered by Uhlenhopp, P.J., and Harris, Larson, Carter, and Wolle, JJ.

UHLENHOPP, J.

This appeal involves legal issues which arose in a prosecution on charges of possession of heroin and cocaine

with intent to deliver and possession of a firearm by a felon.

On February 23, 1982, three officers concerned with investigating controlled substance violations, one of whom was Agent R.J. Smith, presented sworn informations to a judge for warrants to search, so far as we are now concerned, the residence of defendant Cleo Luter in Cedar Rapids, Iowa, and a Lincoln car used by Luter and registered to his mother. In addition to the residence, Luter owned a tavern and a red and black van.

Each information alleged in substance the following. Affiants are officers assigned to narcotics and drug law enforcement. A confidential informant advised that Luter sold him heroin at Luter's residence. The informant has provided names, addresses, telephone numbers, and types of vehicles of other heroin sellers in the area which the informant obtained by personal contact and association with those persons; affiant Smith verified this data through public records, information from the Cedar Rapids Narcotics Unit, criminal history records, and surveillance of the addresses provided. Intelligence provided by the informant led to the arrest of eight individuals on controlled substance charges. On two occasions affiants supervised the undercover purchase of heroin from Luter at his tavern, the Players Palace. On one of those occasions the confidential informant was searched and then fitted with a voice transmitter and provided with government funds; the informant met with a known heroin user and asked if he had any heroin to sell; the user responded negatively; the informant and user went to Players Palace to buy heroin from Luter; affiant Smith observed the user enter Players Palace and return shortly to the in-

formant, and heard the user tell the informant, "Cleo sure has good dope. You know he has 2 kinds—the best for the Blacks and the other stuff for the Whites. You know I always got the best."; affiants followed the informant and user away from the area and received the heroin from the user; and during the purchase from Luter by the user, Luter's red and black van was parked in front of Player's Palace. Affiant Smith also supervised the informant while the informant and a known heroin user bought heroin from Luter at his residence within the previous seventy-two hours; in this instance affiant Bruce Kern observed the user drive to the Luter residence, enter the fenced-in yard, go to the rear of the residence, and return shortly; affiant recited facts substantially like those with respect to the described purchase at Players Palace; in addition the user was heard to tell the informant he bought the heroin from Luter; and on this occasion the Lincoln car used by Luter was parked beside the residence. Confidential informants and information from the Cedar Rapids Metro Narcotics Unit indicate that Luter uses the Lincoln and van while trafficking in controlled substances. A confidential informant advised that Luter sold him heroin at Luter's residence. Affiant Smith has established surveillance at Luter's residence, observed Luter enter and leave the building, and also observed known heroin users enter and leave the building, staying only a few minutes. Luter was previously arrested for conspiracy to deliver heroin and the charge was dismissed; he was also arrested for delivery of a controlled substance, with no disposition of the case.

The judge also endorsed on the informations the following sworn statements by Smith: the informant has a

prior record, was not under the influence of alcohol or drugs at the time he provided the information, and is an adult; the eight cases mentioned in the information are still pending; no current charges are pending against the informant; and no promises of immunity were made to him.

The judge issued the search warrants.

At no point in the search warrant proceedings or in the subsequent proceedings to suppress were the identities of the informant or the user disclosed by the officers.

Section 808.6 of the Iowa Code prescribes the "knock and announce" rule. *See State v. Farber,* 314 N.W.2d 365 (Iowa 1982). Agent Smith, however, did not proceed in that manner. Armed with the warrants, Smith and other officers established surveillance at Luter's residence on the morning of February 25, 1982. Presently Luter emerged from the house, entered the Lincoln, and drove to a filling station. The officers followed. At the station Smith approached the Lincoln on the passenger side and, through the car window, observed two thirty-five millimeter film canisters in the open ashtray of the car. According to the evidence, "individuals commonly use film canisters to transport controlled substances." Smith then entered the Lincoln on the passenger side and instructed Luter to drive to his residence and unlock it because the officers intended to search it pursuant to a warrant. Luter and Smith proceeded to the residence, as did the other officers.

At the residence the individuals got out of the cars and Lieutenant Schutly stood with Luter while Smith went to get Officer Kidwell, the identification officer, to photo-

graph the canisters in the ashtray. Kidwell had not yet arrived and Smith returned to the Lincoln. The canisters were then missing from the ashtray. At that time Luter was at the house, and Smith proceeded there. The two walked down the steps toward the Lincoln, but Luter started running. Smith followed. Luter removed the canisters from his pocket and threw them. Smith tackled Luter, placed him under arrest, and handcuffed him. Meantime Detective Stephens looked for the canisters, found them on the ground, and had them logged for identification. Subsequent tests disclosed that one canister contained four heat-sealed plastic bags of cocaine and one such bag of diazepam (a controlled substance), and one finger cot of heroin. The other canister contained four tin-foil packets and four finger cots of heroin. The evidence shows that finger cots are commonly used to store controlled substances.

The officers proceeded to search the house. They discovered and seized:

> Five packages of Dormin, each package containing seventy-two Dormin pills. According to the evidence Dormin is commonly used by drug dealers, as distinguished from drug users, as "extenders"—to cut the drug and thus increase the volume for sale.
>
> One empty Dormin bottle in a waste basket and one empty finger cot on a closet floor.
>
> Two scales, one of regular ounce size and one of gram size.
>
> One empty quinine bottle. Quinine is commonly used as an extender and gives a bitter taste which drug users equate with quality.
>
> Straws—commonly used to "snort" cocaine.

Mirrors—commonly used in cutting cocaine on a shiny surface.

Razor blades—commonly used to cut a substance for mixing.

Measuring spoon with powdery residue, approximately gram size commonly used to measure cocaine; and playing card, commonly used to level off measuring spoon.

Glass smoker, commonly used to smoke hashish or marijuana.

Unopened box of a gross of finger cots.

Wrappers of finger cot containers, in garbage.

Baggies with powdery residue inside.

Bits of plastic, commonly used for wrapping controlled substances.

"Pot" pipe.

Pipe of kind used for "freebasing" cocaine.

Sno-Seal of kind sold at head shops.

Glass flasks of kind used to contain controlled substances.

Sifter, containing powdery residue.

Pseudo Caine, commonly used cocaine extender.

Paper squares of kind used to wrap cocaine.

Packet of heroin, found in container in pocket of jacket hanging in bathroom.

Loaded shotgun beside filing cabinet.

Loaded shotgun beside Luter's bed.

In subsequent proceedings the county attorney charged Luter with possession with intent to deliver both heroin and cocaine, and with possession of a firearm as a felon. At trial the State introduced the evidence we have recited

from the search incident and evidence that Luter had been previously convicted of a felony. Luter testified he was a user of controlled substances but not a seller. The jury found Luter guilty on all counts, the trial court passed sentence, and Luter appealed.

I. Luter moved before trial to suppress the real evidence, the district court overruled the motion, and Luter unsuccessfully endeavored at trial to exclude that evidence. On appeal he first contends that (1) the search and the seizure were illegal and (2) the search warrants were invalid as based on affidavits (a) lacking proof as to the knowledge and credibility of the unidentified person who provided the information and (b) containing falsification as to the source of that information.

Luter argues that the entire search and seizure were illegal because the judge did not have probable cause to issue a warrant to search the Lincoln. Luter's argument continues that the search of the Lincoln under an invalid warrant led to the seizure of the canisters.

The State argues in opposition that the canisters were not seized under the warrant to search the Lincoln; Smith did not stop the Lincoln, Luter himself stopped it at a filling station; Smith had a right to be there; he did not discover the canister from a search of the Lincoln, he saw the canisters from outside the car; nor did he seize the canisters from the car. *See* W. LaFave, *Search and Seizure* § 2.5, at 355 (1978). The State thus contends that Smith's entry of the car to be returned for search of the house and his subsequent seizure of the canisters when they were found on the ground were not dependent on the warrant to search the Lincoln; Smith had a right to do

what he did as a result of events as they transpired at the time, independent of the warrant to search the Lincoln.

We prefer, however, to rest the decision on this point upon another ground. Let Luter's contention be assumed that the seizure of the canisters resulted from the warrant to search the Lincoln. The statements provided the judge in the information were that heroin had been purchased at Luter's Players Palace and at his residence, from which the judge could infer drug operations at both sites. Affiants further swore that the van was "known to be used by Cleo Luter" and was in front of Players Palace when the user bought heroin there; and the Lincoln was likewise "known to be used by Cleo Luter" and was beside Luter's residence when the user bought heroin at that place. The judge could reasonably infer that drugs were probably transported between Luter's two places, the Palace and the residence, and that they were transported in one or both of the vehicles.

In determining whether probable cause existed to issue the warrant to search the Lincoln, the judge had a right to consider all the circumstances set forth in the information. *Illinois v. Gates,* — U.S. —, —, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527, 548, *reh'g denied,* — U.S. —, 104 S. Ct. 33, 77 L. Ed. 2d 1453 (1983) ("The task of the issuing magistrate is simply to make a practical, common-sense decision whether, *given all the circumstances set forth in the affidavit before him,* including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found at a particular place." (Emphasis added.); *Spinelli v. United States,* 393 U.S. 410, 419, 89 S. Ct. 584, 591, 21 L. Ed. 2d 637, 645 (1969) (magistrate's

determination of probable cause "should be paid great deference by reviewing courts"); *United States v. Ventresca,* 380 U.S. 102, 108, 109, 85 S. Ct. 741, 746, 13 L. Ed. 2d 684, 689 (1965) (disapproval of a "grudging or negative attitude by reviewing courts toward warrants" and of interpreting affidavits "in a hyper-technical, rather than a commonsense, manner"). *See also United States v. Evans,* 447 F.2d 129 (8th Cir. 1971), *cert. denied,* 404 U.S. 1047, 92 S. Ct. 727, 30 L. Ed. 2d 735 (1972); *United States v. Mazurkiewicz,* 443 F. 2d 1135 (3rd Cir. 1971); *United States v. McDonnell,* 315 F.Supp. 152 (D. Neb. 1970); *State v. Bennett,* 256 S.C. 234, 182 S.E.2d 291 (1971), *cert. denied,* 405 U.S. 924, 92 S. Ct. 965, 30 L. Ed. 2d 792 (1972); *State v. McRae,* 255 S.C. 287, 178 S.E.2d 666 (1971). We reject Luter's contention that probable cause did not exist for the issuance of a warrant to search the Lincoln. By the same token an even stronger showing of probable cause existed for the issuance of a warrant to search the residence.

As to Luter's argument that the search warrants were invalid because the affidavits did not contain proof of the two requirements of the credibility and the knowledge of the unidentified informant and user, the United States Supreme Court recently made a substantial change in this area of the law. *Illinois v. Gates,* — U.S. —, 103 S. Ct. 2317, 76 L. Ed. 2d 526 (1983). Previously statements in affidavits as to the factors of reliability and basis of knowledge of persons supplying hearsay information played a controlling role. *Spinelli v. United States,* 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969); *Aguilar v. Texas,* 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964). Those factors remain relevant but not absolute; *Gates* changed

the test to the approach of the totality of the circumstances. After considering the underlying considerations, the Court stated in *Gates,* — U.S. at —, 103 S. Ct. at 2332, 76 L. Ed. 2d at 548 (citations omitted):

> For all these reasons, we conclude that it is wiser to abandon the "two-pronged test" established by our decisions in *Aquilar* and *Spinelli.* In its place we reaffirm the totality of the circumstances analysis that traditionally has informed probable cause determinations. The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed. We are convinced that this flexible, easily applied standard will better achieve the accommodation of public and private interests that the Fourth Amendment requires than does the approach that has developed from *Aguilar* and *Spinelli.*

Applying the *Gates* test and examining the affidavits involved here and all parts of those affidavits including the circumstances and the prior instances recited, we conclude that the issuing judge "had a 'substantial basis for . . . conclud[ing]' that probable cause existed."

Regarding Luter's argument that the affidavits contained falsification, we turn to *State v. Groff,* 323 N.W.2d 204 (Iowa 1982). We there summarized and adopted the holding in *Franks v. Delaware,* 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). We stated:

> In the cited decision the United States Supreme Court held that where a defendant establishes by a

> preponderance of the evidence an affiant made a false statement in a search warrant affidavit knowingly and intentionally, or with reckless disregard for the truth, the Fourth Amendment requires the statement be deleted from the affidavit and the remaining contents be scrutinized to determine whether probable cause appears. If the remaining contents are insufficient to establish probable cause, the warrant is void and the evidence obtained in the search must be excluded as though probable cause was lacking on the face of the affidavit.

323 N.W.2d at 206.

The gist of Luter's falsification allegation is that the reliability and knowledge of the *user* were important, that the affidavits recited the reliability of the *informant,* and that the affidavits thereby led the issuing judge down the wrong path. *See State v. Paterno,* 309 N.W.2d 420, 424 (Iowa 1981) (false statement is one which leads to a misconception).

We think this approach gives insufficient credit to the issuing judge. The affidavits make plain on their face not once but twice that the two buys in question were not personally consumated by the informant and that a user was also involved. Why the officers found this two-step procedure necessary we need not inquire; the affidavits showed that Luter had been involved in prior drug charges and perhaps he was unusually wary. In any event, on examining the affidavits the issuing judge could hardly have missed the recitation of the two-step procedure. Luter has not demonstrated that the judge misconceived the situation. We hold that the search and seizure were lawful.

II. Conceding the evidence was sufficient to convict him of possessing heroin and cocaine, Luter contends that

as a matter of law the evidence was insufficient to convict him of intent to deliver those substances. The governing rule is stated in *State v. Robinson,* 288 N.W.2d 337, 340 (Iowa 1980) ("although Iowa courts view the evidence in the light most favorable to the prosecution they must consider *all* the evidence when determining the sufficiency of the evidence to support a guilty verdict"). Substantial evidence must be introduced in support of the charge, and substantial evidence is "such evidence as could convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt." *State v. Aldape,* 307 N.W.2d 32, 39 (Iowa 1981).

Far from being a weak case for the jury, we view this record as a strong jury case of intent to deliver controlled substances as distinguished from mere intent use to them. As the customary instruction states, intent is seldom capable of direct proof and may be ascertained by "such reasonable inferences and deductions as may be drawn from the facts proved by the evidence in accordance with common experience and observation." *State v. Serr,* 322 N.W.2d 96, 101 (Iowa App. 1982). Relevant considerations include manner of packaging the substance; presence of weighing devices; and existence of other paraphernalia commonly used in drug dealing. *State v. TeBockhorst,* 305 N.W.2d 705, 708 (Iowa 1981); *State v. Birkestrand,* 239 N.W.2d 353, 362 (Iowa 1976); *State v. Boyd,* 224 N.W. 2d 609, 612-13 (Iowa 1974).

The evidence of the canisters found outside the residence and the evidence found inside the residence is replete with the instrumentalities of the drug trade. Luter was transporting the canisters from his residence to some destination at the time he was intercepted. Recovered

after he attempted to dispose of them, one canister contained four heat-sealed bags of cocaine and one of diazepam and a finger cot of heroin, and the other canister contained four tinfoil packets and four finger cots of heroin.

Luter argues that the actual amounts of cocaine and heroin in the packets were small; thus he concludes an inference of intended personal use is as reasonable as an inference of intended delivery to others. But the number of packets, taken with the items found in the residence, persuade us that a jury could reasonably infer intent to deliver.

Not only could the jury find that the items seized constituted persuasive evidence of what Luter was up to, it could also find that the State's cross-examination of Luter's explanation of the items was devasting—for example, Luter's attempt on cross-examination to explain away 360 Dormin pills or a gross of finger cots. We hold that abundant evidence was introduced from which the jury could reasonably find intent to deliver.

III. Luter's next proposition relates to his conviction of possession of a firearm as a felon. The General Assembly has provided in section 724.26 of the Iowa Code (1981):

> Any person who is convicted of a felony in any state or federal court and who subsequently possesses, receives, or transports or causes to be transported a firearm or offensive weapon is guilty of an aggravated misdemeanor.

Also in section 724.27:

> The provisions of [section] . . . 724.26 shall not apply to a person who is pardoned or has had his or her civil rights restored by the President of the United States or the chief executive of a state and who is ex-

> pressly authorized by the President of the United States or such chief executive to receive, transport, or possess firearms or destructive devices.

Luter argues that the State had the burden to negate the existence of the exceptions under section 724.27. Neither party introduced any evidence on that subject.

This proposition is controlled, adversely to Luter, by the analogy of our recent holding in *State v. Bowdry,* 337 N.W.2d 216 (Iowa 1983). We do not find merit in Luter's proposition.

IV. Luter demanded to know the identity of the user who allegedly bought heroin from him. The trial court sustained the State's objections that the user's identity was privileged. Luter argues that the court erred. The problem arises in two contexts: disclosure *at trial* of the user's identity, and disclosure at the *pretrial hearing* on the motion to suppress the evidence obtained under the search warrants.

A. If an informant does not simply provide officers with information but personally observes or participates in the incident which is the basis of the charge on which the defendant is tried, fairness dictates that the defendant ordinarily be apprised of the identity of the informant so that he can ascertain what the informant knows about the incident and perhaps use the informant as his own witness. In this context the individual in question is not merely an *informant,* he is a *witness* to the event. *Roviaro v. United States,* 353 U.S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957); *State v. Webb,* 309 N.W.2d 404 (Iowa 1981); *State v. York,* 256 N.W.2d 922 (Iowa 1977); *State v. Sheffey,*

243 N.W.2d 555 (Iowa 1976); *State v. Lamar,* 210 N.W.2d 600 (Iowa 1973).

On the other hand, the cited decisions also state as a general rule that the prosecution cannot ordinarily be required to divulge the identity of an informant as such, as distinguished from a witness to the event constituting the basis for the charge. The reasons for this privilege of nondisclosure are articulated in 8 Wigmore, *Evidence* § 2374, at 761-62 (McNaughton rev. 1961):

> A genuine privilege, on . . . fundamental principle . . . must be recognized for the identity of persons supplying the government with information concerning the commission of crimes. Communications of this kind ought to receive encouragement. They are discouraged if the informer's identity is disclosed. Whether an informer is motivated by good citizenship, promise of leniency or prospect of pecuniary reward, he will usually condition his cooperation on an assurance of anonymity—to protect himself and his family from harm, to preclude adverse social reactions and to avoid the risk of defamation or malicious prosecution actions against him. The government also has an interest in nondisclosure of the identity of its informers. Law enforcement officers often depend upon professional informers to furnish them with a flow of information about criminal activities. Revelation of the dual role played by such persons ends their usefulness to the government and discourages others from entering into a like relationship.
>
> That the government has this privilege is well established, and its soundness cannot be questioned.

In the present case the user did not participate in the seizure of the two canisters or of the paraphernalia in the residence. The charge which was tried was not predicated on an incident that the user observed or in which he participated. We thus think the trial court was right in

refusing to require the State to divulge the user's identity *at trial.* Luter could and did obtain a fair trial without that knowledge.

B. Disclosure of the user's identity in the *pretrial hearing* on the motion to suppress presents a closer question. Here we have two opposing considerations. On the one hand, the user did participate in the purchases of heroin which constituted incidents recited in the informations for search warrants. On the other hand, those purchases of heroin were not the basis for the charge; they were part of the intelligence previously used to obtain warrants. This distinction is significant. *State v. Burnett,* 42 N.J. 377, 386-87, 201 A.2d 39, 44 (1964) ("We must remember also that we are not dealing with the trial of the criminal charge itself. There the need for a truthful verdict outweighs society's need for the informer privilege. Here, however, the accused seeks to avoid the truth. The very purpose of a motion to suppress is to escape the inculpatory thrust of evidence in hand, not because its probative force is diluted in the least by the mode of seizure, but rather as a sanction to compel enforcement officers to respect the constitutional security of all of us under the Fourth Amendment."). As the purchases by the user are not the basis for the charges on trial, if the user himself had been in confederation with the officers in making the purchases for the purpose of obtaining a warrant we would not hesitate to apply the informant privilege to him and uphold the district court's ruling of nondisclosure.

Luter argues that the user was not in confederation with the officers and thus was not really an informant; he bought the heroin for the informant, not for the officers. Hence, so Luter's argument goes, the basis for the priv-

ilege of nondisclosure—to promote the free flow of information—does not exist.

Under the particular circumstances of this case, however, we think for two reasons the user should be treated, for nondisclosure purposes, the same as an informant. First, in fact the user was a part of Agent Smith's apparatus for obtaining a buy and was actually an extension of the informant himself; and second, revelation of the user's identity, if known, would seriously jeopardize the informant's anonymity contrary to the rationale of the informant privilege. In addition, the principal argument in opposition to the informant privilege is the possibility of police perjury—perhaps an informant may not even exist. 1 LaFave, *Search and Seizure* § 3.3(g) (1978). Even if we were inclined to accept the perjury argument, which we are not, we would doubt that the present more complicated two-step arrangement for the purchases would be a figment of the officers' minds, as distinguished from an actual happening. Why would they invent such an involved event for their informations? We hold that the trial court did not err in refusing to require disclosure of the user's identity.

V. In two divisions of his argument Luter alleges error in the trial court's failure to give his requested instruction that if an inference of guilt of possession of heroin is as consistent with the evidence as an inference of possession of heroin with intent to deliver, the jury must find Luter not guilty of possession of heroin with intent to deliver, and that the jury must not speculate on whether the greater or the included offense was committed. The request also covered the cocaine charge. Luter claims he was entitled to a directed verdict for the same reason. He

relies on a case involving a federal trial, *United States v. Jones,* 418 F.2d 818 (8th Cir. 1969).

Jones involved a prosecution for robbery and for receiving stolen property, predicated on possession by the defendant of the stolen property. We need not say whether we would follow that decision in a corresponding evidentiary context. The evidence here goes considerably beyond mere possession of the heroin and cocaine. It involves a substantial amount of damning real evidence in the form of the accoutrements of the drug trade.

Moreover, the trial court submitted the criminal case in the way which is customary in this jurisdiction. It initially told the jury that guilt must be established by the State beyond a reasonable doubt. Proceeding to the charge of heroin (and correspondingly, to the charge of cocaine), the court told the jury that it could not find Luter guilty of possession with intent to deliver unless the State established beyond a reasonable doubt all of the elements, namely, (1) possession of heroin, (2) knowledge that the substance possessed was heroin, and (3) intent to deliver the substance; that if the State so established all of the three elements the jury will find guilt of possession of the controlled substance with intent to deliver; that if the State so established elements 1 and 2 but not 3, the jury will find guilt of possession; and if the State failed to establish element 1 or 2, the jury will find defendant not guilty. The instruction conformed to II *Iowa Uniform Jury Instructions* No. 3004A (1982). It sufficinetly and properly stated the Iowa law on the point Luter now raises. A trial court may use its own form of instructions when they properly state the law on the issues. *State v. Rupp,* 282 N.W.2d 125, 126 (Iowa 1974).

By the same token no necessity existed for the trial court to instruct under *Jones* that the jury could not speculate as to whether the greater or lesser offense was committed—possession with intent to deliver, or mere possession. The court negated any jury findings based on speculation when it confined the jury findings to proof beyond a reasonable doubt of all elements of the respective charges. We find no error.

VI. In the next two divisions of his argument Luter objects to the trial court's inclusion of the last paragraph of uniform criminal jury instructions 215 (intent) and 230 (knowledge), which accord with the bar association committee's notation to the uniform instruction on possession of a controlled substance with intent to deliver, No. 3004A ("With this offense, Uniform Instruction 215—Intent, and Uniform Instruction 230—Knowledge, should be given."). After stating that intent (or knowledge) is seldom capable of direct proof and may be ascertained by reasonable inferences from the facts proved in accordance with common experience and observation, the last paragraph of uniform instruction 215 (and 230) states:

> In determining the intent [knowledge] of any person, you may, but are not required to infer that he intended [knew] the natural and probable consequences which ordinarily follow such acts.

Luter argues that this paragraph tends to nullify the presumption of innocence and to shift the burden of persuasion to him.

We considered this subject fully in *State v. Pinehart*, 283 N.W.2d 319 (Iowa 1979) *cert. denied*, 440 U.S. 1088, 100 S. Ct. 1049, 62 L. Ed. 2d 775 (1980). *See also Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39

(1979). The trial court also gave instructions on the presumption of innocence and on the State's burden of proof. The paragraph in question is a proper statement of law. *State v. Elam,* 328 N.W.2d 314 (Iowa 1982).

Luter also argues no "acts" by him are involved in the case, and the paragraph is inappropriate for that additional reason. But his possession of the drug dealer paraphernalia involved conduct by him—he acquired them at some point and maintained them in his residence—and therefore involved in a species of acts. His conduct with reference to the two canisters also involved acts. We do not find merit in these two divisions of his argument.

VII. Luter argues that the trial court should have granted his motion for mistrial based on misconduct of the prosecutor in cross examining him.

The State's case on possession itself was overwhelming. The effort of the defense was to avoid a conviction for possession "with intent to deliver." To that end Luter took the stand and endeavored to convince the jury he was merely a drug user and thus to negate the State's claim he was a drug dealer. Accordingly Luter testified at length on direct examination about his use of cocaine and heroin, manifestly to leave the impression that this was the extent of his involvement with drugs.

The drug dealer paraphernalia which the State seized militated in the opposite direction—that Luter was in the drug business. Seeking to refute the impression that Luter tried to create in his direct examination, the prosecutor interrogated Luter directly about selling drugs. Trial counsel for Luter allowed several of these questions to be asked and answered before he interposed a motion

for mistrial. The trial court treated the motion as an objection to the pending question and sustained it, and the matter was not pursued.

We pass by the point that if defense counsel regarded this cross-examination as improper he should have interposed his objection at the outset of it, and the additional point that the prosecutor did not succeed in getting admissions from Luter—the answers were negative. *See* 24B C.J.S. *Criminal Law* § 1914(5), at 29 (1962) (no prejudice). We incline to the view that the defense tactics in the direct examination opened the door to this cross-examination. The defense wanted to show and argue that Luter was a mere user—without any cross-examination on that subject. But when Luter opened the subject on his role with respect to drugs, he could not escape cross-examination which directly bored into it.

Cross-examination of the accused in a criminal case is strictly confined to the matters testified to on direct examination. Iowa R. Crim. P. 19(1). "This does not mean, however, that the 'prosecutor can only parrot the questions propounded on direct. Cross-examination may deal with *matters* inquired into on direct, and questions fairly within the area of those matters constitute proper cross-examination.' " *State v. Holmes,* 325 N.W.2d 114, 117 (Iowa 1982) (quoting *State v. Jensen,* 189 N.W.2d 919, 923-24 (Iowa 1971)). *See also State v. Freie,* 335 N.W.2d 169 (Iowa 1983); *State v. Jackson,* 259 N.W.2d 796 (Iowa 1977). We find no error here.

VIII. Luter contends the trial court erred in admitting items of real evidence into the record over his objection that a chain of custody was not established. We

stated in *State v. Lamp*, 322 N.W.2d 48, 57 (Iowa 1982) (citations omitted):

> As a foundational prerequisite to the admissibility of physical evidence, the prosecution is required to show a sufficient custody to establish that the article has not been altered between the time it was obtained and the time it is introduced at trial. The showing required is that it is reasonably probable that tampering, substitution, or alteration did not occur. The sufficiency of the showing is dependent on the susceptibility of the article to alteration or substitution. Whether the prosecution has established a proper chain of custody is a matter committed to the sound discretion of the trial court; reversal is warranted only when there has been a clear abuse of discretion.

We have examined the record with respect to these items of evidence and hold that an abuse of discretion by the trial court does not appear.

IX. Luter asserts finally that the trial court erroneously allowed testimony to be introduced on direct and redirect examination of Agent Smith regarding surveillance of Luter. He argues that the testimony was hearsay, immaterial, beyond the scope of the cross-examination, and outside the minutes of testimony. The testimony in question manifestly was not hearsay or immaterial. It was background information within the knowledge of Smith, and it was pertinent to the charges on trial. If the testimony on redirect examination was beyond the scope of cross-examination of Smith—which we question—it still would not warrant a reversal of the judgment. Luter could have recross-examined the same as if the State had recalled Smith for further direct examination, and indeed the court offered to let Luter do so. The question is thus

whether error occurred because the testimony went beyond the minutes.

We stated the present rule on this point as follows in *State v. Walker,* 281 N.W.2d 612, 614 (Iowa 1979):

> Minutes need not detail each circumstance of the testimony, but they must be sufficient—fully and fairly—to alert defendant generally to the source and nature of the evidence against him. The testimony Kehoe gave on recall concerned a matter—business records—which the state concedes it did not know about until the trial was underway. The minute did little more than identify the witness and state the conclusion that the tires in question were stolen. Under the new rules defendant is entitled to more.

We have also held that error in admitting testimony which does go beyond the minutes can be harmless, if the defendant was apprised of it before trial so that he was aware of it. After citing the *Walker* rule, we stated in *State v. Waterbury,* 307 N.W.2d 45, 51 (Iowa 1981) (citations omitted):

> But in this case defendants were thoroughly apprised of the evidence to be presented by this witness's testimony two months before trial. The elements of surprise or prejudice were non-existent. Thus we hold there was no reversible error in permitting the testimony to be introduced despite the faulty minute in the trial information. Our ruling should not be interpreted as imposing any burden on an accused to take discovery depositions to avoid a claim of waiver of error relating to an incorrect or insufficient minute of testimony.

We reaffirmed *Waterbury* in the more recent case of *State v. Conner,* 314 N.W.2d 427 (Iowa 1982).

We are satisfied that from Luter's discovery and the hearings on motions to suppress, Luter was aware of the substance of this testimony and was not surprised by it at trial. No prejudice appears. We also note that this testimony was preliminary and foundational in nature and not of sufficient cogency on the merits to constitute a basis for reversal of the judgment.

On the whole case we are impressed by the record that Luter was thoroughly and vigorously defended and received a fair trial. The verdict and sentence should stand.

AFFIRMED.

APPENDIX C

IN THE SUPREME COURT OF IOWA

No. 83-45

STATE OF IOWA,

Appellee,

vs.

CLEO LUTER,

Appellant.

O R D E R

(Filed May 10, 1984)

After consideration by the court en banc, appellant's petition for rehearing in the above-captioned case is hereby overruled and denied.

Done this 10th day of May, 1984.

THE SUPREME COURT OF IOWA

/s/ W. W. Reynoldson, Chief Justice

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APPENDIX D

Information for Search Warrant, filed 2/25/82

IN THE DISTRICT COURT OF IOWA
IN AND FOR LINN COUNTY, IOWA

STATE OF IOWA,

Plaintiff,

vs.

DQF 119, a 1979 beige Lincoln Versailles, operated by Cleo Luter, and registered to his mother Gertrude Luter, all located in Cedar Rapids, Iowa, Linn County, Iowa,

Defendant.

INFORMATION FOR
SEARCH WARRANT

State of Iowa, County of Linn) ss:

I, R. J. Smith, R. Stephens, B. Kern, being first duly sworn on oath states that he is a credible resident of Linn County, Iowa, that he has good reason and probable cause to believe and does believe, that certain personal property described as follows:

Schedule I controlled substances, items to manufacture controlled substances (adulterants and diluents) such as Dorman, Lactose, and Mannitt, items such as scales, screens, spoons, and items for repackaging, finger stalls, and aluminum foil. Items to show constructive possession such as telephone records, utility records, personal letters, photographs and clothing, and such other controlled substances as listed in Chapter 204 Code of Iowa

has been illegally kept; and/or

(b) has been used as a means of accomplishing a public offense; and/or

(c) is being used with intent to commit a public offense; and/or

(d) is property relevant and material as evidence in a criminal prosecution; and/or

held in violation of the laws of the State of Iowa: Chapter 204.401, State Code of Iowa at the following described premises, place, residence, and/or automobile:

DQF 119, a 1979 Beige Lincoln Versailles, operated by Cleo Luter, and registered to his mother Gertrude Luter, all located in Cedar Rapids, Iowa, Linn County, Iowa.

That the facts and circumstances which lead me to believe that there is probable cause that a crime was committed and that the above described premises, place, residence and/or automobile should be searched are as follows:

1) Your affiant, R. J. Smith, states that he is employed as a Special Agent of the Iowa Department of Public Safety, Division of Criminal Investigation, assigned to Narcotics and Drug Enforcement. That he has been a police officer for 19 years. That he is presently assassigned to narcotic and drug enforcement in the Cedar Rapids/Linn County area, conducting investigations into heroin trafficing in the area since July, 1981.

2) The affiants, R. Stephens and B. Kern, are members of the Cedar Rapids Narcotics Division and have participated in the investigations into heroin trafficing in the Cedar Rapids/Linn County area.

3) That a confidential informant advised that Cleo Luter has sold heroin to the informant at the residence at 1112 10th St. SE, Cedar Rapids, Iowa.

4) The confidential informant has provided names, addresses, phone numbers, and types of vehicles of other persons who are selling heroin in the Cedar Rapids area. The informant has obtained information by personal contact and association with these individuals. Your affiant, R. J. Smith, has verified this information through public records, information from the Cedar Rapids Metro Narcotics Unit, criminal history records and surveillance of the addresses provided and found this information accurate.

5) Your affiant, R. J. Smith, has established surveillance at 1112 10th St. SE, Cedar Rapids, Iowa, and has observed Cleo Luter enter and exit the building. Your affiant, R.J. Smith, has also observed known heroin users enter and exit the building, staying only a few minutes inside.

6) That a review of the Cedar Rapids City Assessors Records indicate that Cleo Luter is the owner of the residence at 1112 10th St. SE, Cedar Rapids, Iowa.

7) That a review of the records of the Cedar Rapids Police Department indicate that Cleo Luter was arrested March 10, 1978, for conspiracy to deliver heroin, charged dismissed; arrested June 10, 1980, delivery of a controlled substance, no disposition. (continued on attached sheet)

WHEREFORE, the undersigned applies to John F. Siebenmann, a Judge of the District Court of Linn County, Iowa, for a search warrant to be issued and the said vehicle be searched for said property.

/s/ R.J. Smith, R. Stephens, B. Kern

Subscribed and sworn to before me and in my presence by said R.J. Smith, R. Stephens, B. Kern, this 23rd day of February, 1982.

/s/ Denton Schultz, Notary Public
In and for Linn County, Iowa

I, John F. Siebenmann, hereby certify that in issuing the search warrant in this matter, I relied upon the foregoing sworn testimony of the foregoing applicant(s). In addition, I relied upon the sworn testimony of the persons whose names, addresses and an abstract of their sworn testimony, appears below.

R.J. Smith, sworn and under oath, states defendant has a prior record, was not under influence of alcohol or drugs at time information provided; is adult, that eight cases of arrest are still pending; the current charges are pending against informant; that no promises of immunity were made by officers to informant.

/s/ John F. Siebenmann
Assoc. Judge of the District Court
of Iowa

8:37 p.m.
2-23-82

I, John F. Sibenmann, hereby certify that in issuing the search warrant in this matter, the grounds for issuance of it is supplied by an informant who gave the information to Peace Officer R. J. Smith whose address is Cedar Rapids, Linn Co., Iowa and I hereby certify and find that such informant had previously given reliable information.

/s/ John F. Siebenmann
Assoc. Judge of the District Court
of Iowa

INFORMATION FOR SEARCH WARRANT (cont'd.)

8) Your affiant, R. J. Smith, supervised a confidential informant while confidential informant and a known heroin user made a purchase of heroin from Cleo Luter at 1112 10th St. SE, Cedar Rapids, Iowa. On this occasion the confidential informant was searched and fitted with a body voice transmitter and provided with prerecorded serialized government funds for the purpose of purchasing heroin from Cleo Luter at his residence. The confidential informant met with the known heroin user and inquired of the user where the informant could purchase heroin. The user indicated that the user had no heroin, and the user and the informant then travelled to the area of the Luter residence. The known heroin user was given the prerecorded serialized government funds and went to the Luter residence and returned to the informant, giving the informant the heroin purchased. Your affiant, R. J. Smith, Detective Bruce Kern and Lt. Denton Schultz monitored the conversation between the confidential informant and the known heroin user, at which time the known heroin user told the informant that the heroin had been purchased from Cleo Luter. The known heroin user was also overheard telling the informant that, "Cleo Luter has some good dope." Your affiant, Detective Bruce Kern, observed the known heroin user drive up to the Luter residence, exit the vehicle, and enter the fenced-in yard. The user then went to the rear of the residence, and returned to the vehicle shortly after. This purchase of heroin from the Luter residence occurred within the last 72 hours.

9) Your affiants, R. J. Smith, Bruce Kern, Richard Stephens, supervised and monitored the undercover pur-

chase of heroin from Cleo Luter at the Players Palace Tavern at 321 9th Ave. SE, Cedar Rapids, Iowa on 2 occasions.

10) On one occasion at the Players Palace a confidential informant was searched and fitted with a body voice transmitter device and provided with prerecorded serialized government funds and then met with the known heroin user and inquired if the user had any heroin to sell. The user indicated that the user did not have any heroin. Then the informant accompanied the known heroin user to the area of the Players Palace for the purpose of purchasing heroin from Cleo Luter. The known heroin user was observed by you affiant, R. J. Smith, exiting the vehicle and then entering the Players Palace and then returning shortly to the vehicle. Your affiant, R. J. Smith, then overheard the known heroin user telling the informant that, "Cleo sure has good dope. You know he has 2 kinds—the best for the Blacks and the other stuff for the Whites. You know I always get the best." Your affiants, R. J. Smith, R. Stephens, and B. Kern, then followed the informant and the known heroin user away from the area. Your affiant, R. J. Smith, then met with the informant and received the heroin from the informant that was purchased from Cleo Luter by the known heroin user.

11) Your affiant, R. J. Smith, gave the aforementioned heroin received from the informant to Lt. Denton Schultz who in turn performed a narcotics field test on a sample of the said heroin for a positive reaction for an opiate.

12) During the undercover purchase of heroin from the Luter residence described in Paragraph 8, Cleo Luter's vehicle known to be used by Cleo Luter, a light beige 1979 Lincoln Versailles DQF119, registered to Gertrude Luter, was parked in the alley beside the residence.

13) During the undercover purchase of heroin at the Players Palace as described in Paragraph 10, a red and black 1970 Ford van, known to be used by Cleo Luter, was parked in front of the Players Palace, Iowa registration DF 1609, registered to Cleo Luter of 1112 10th St. SE, Cedar Rapids, Iowa.

14) Confidential informants and information received from the Cedar Rapids Metro Narcotics Unit indicates that Cleo Luter uses the aforementioned 2 vehicles while trafficing in controlled substances.

15) The confidential informant mentioned in the aforementioned paragraphs has provided information in the past that has led to the arrest of 8 individuals on controlled substance charges.

APPENDIX E

Search Warrant (automobile), filed 2/25/82

IN THE DISTRICT COURT OF IOWA
(District, Municipal, Justice)

IN AND FOR LINN COUNTY, IOWA
(Iowa, Cedar Rapids, or Name of Township)

STATE OF IOWA

vs.

DQF 119, a 1979 beige Lincoln Versailles, operated by Cleo Luter, and registered to his mother Gertrude Luter, all located in Cedar Rapids, Linn County, Iowa
(Describe as on Information For Search Warrant)

Defendant.

SEACH WARRANT

THE STATE OF IOWA
TO ANY PEACE OFFICER OF
LINN COUNTY, IOWA

Proof having been this day made before me as provided by law that certain property is owned or possessed in violation of the laws of Iowa in said county, in the State of Iowa, in the place, building, and dependencies thereto described as follows: (Describe as set forth above.)

DQF 119, a 1979 beige Lincoln Versailles, operated by Cleo Luter, and registered to his mother Gertrude Luter, all located in Cedar Rapids, Linn County, Iowa and occupied by and in possession of the person above named as defendant and being satisfied that the foregoing recital relative to said property is probably true, now, therefore, you are commanded to make immediate search of the premises and person above described and search for: Schedule I controlled substances, items to manufacture controlled substances (adulterants and dilutents) such as Dorman, Lactose, and Mannitt, items such as scales,

screens, spoons, and items for repackaging, finger stalls, and aluminum foil. Items to show constructive possession such as telephone records, utility records, personal letters, photographs and clothing, and such other controlled substances as listed in Chapter 204 Code of Iowa. And if said property or any part thereof be found you are commanded to bring said property forthwith before me at my office.

Dated at Cedar Rapids, Iowa, this 23rd day of February, 1982.

8:48 p.m.
2/23/82

/s/ John F. Siebenmann
Judge of the District Court
of Iowa
(District, Municipal, Justice)

RETURN OF SERVICE

STATE OF IOWA)
)ss.
LINN COUNTY)

I, R. J. Smith, R. Stephens, B. Kern, being a peace officer in and for Linn County, State of Iowa, hereby certify that the within search warrant came into my hands on the 23 day of February, A. D. 1982, and on the 25 day of February, A. D., 1982, I executed said warrant by making a search of the premises therein described and found on the premises therein designated the following property, to-wit: Marijuana which said property I seized by virtue of the within warrant and which I now hold subject to further orders of the court.

I have further executed the within warrant by giving a copy thereof, together with a receipt for the property taken to defendent. (sic)

No person having been found on the within premises, I have left a copy of the within warrant and a receipt for the property taken in the place where the property taken was found.

I, the officer by whom the annexed warrant was executed, do certify that the above inventory contains a true and detailed account of the property taken by me on the warrant, and was made publicly and in the presence of the person from whom taken.

Fees $ .....

Services .....

Mileage .....

Cartage .....

/s/ R. J. Smith, R. Stephens, B. Kern
Official Title

Subscribed and sworn to before me on this 25 day of February 1982.

/s/ Denton Schultz
Notary Public

Rec'd 2/25/82, 3:48 p.m. from John Siebenmann, Dist. Assoc. Judge

APPENDIX F

Information for Search Warrant, filed 2/25/82

IN THE DISTRICT COURT OF IOWA
IN AND FOR LINN COUNTY, IOWA

STATE OF IOWA,

Plaintiffs,

vs.

Cleo Luter and his residence at 1112 10th St. SE, and individuals unknown to the affiants by name and description at this residence, all located in Cedar Rapids, Linn County, Iowa,

Defendant.

STATE OF IOWA)
)ss.
COUNTY OF LINN)

INFORMATION FOR SEARCH WARRANT

I, R. J. Smith, R. Stephens, B. Kern, being first duly sworn on oath states that he is a credible resident of Linn County, Iowa, that he has good reason and probable cause to believe and does believe, that certain personal property described as follows:

Schedule I controlled substances, items to manufacture controlled substances (adulterants and diluents) such as Dorman, Lactose, and Mannitt, items such as scales, screens, spoons, and items for repackaging, finger stalls, and aluminum foil. Items to show constructive possession such as telephone records, utility records, personal letters, photographs and clothing, and such other controlled substances as listed in Chapter 204 Code of Iowa, has been illegally kept; and/or (b) has been used as a means of accomplishing a public offense; and/or (c) is being used

with intent to commit a public offense; and/or (d) is properly relevant and material as evidence in a criminal prosecution; and/or held in violation of the laws of the State of Iowa: Chapter 204.401, State Code of Iowa at the following described premises, place, residence, and/or automobile: Cleo Luter and his residence at 1112 10th St. SE, and individuals unknown to the affiants by name and description at this residence, all located in Cedar Rapids, Linn County, Iowa.

That the facts and circumstances which lead me to believe that there is probable cause that a crime was committed and that the above described premises, place, residence and/or automobile should be searched are as follows: 1) Your affiant, R. J. Smith, states that he is employed as a Special Agent of the Iowa Department of Public Safety, Division of Criminal Investigation, assigned to Narcotics and Drug Enforcement. That he has been a police officer for 19 years. That he is presently assigned to narcotic and drug enforcement in the Cedar Rapids/Linn County area, conducting investigations into heroin trafficing in the area since July, 1981.

2) The affiants, R. Stephens and B. Kerns, are members of the Cedar Rapids Narcotics Division and have participated in the investigation into heroin trafficing in the Cedar Rapids/Linn County area.

3) That a confidential informant advised that Cleo Luter has sold heroin to the informant at the residence at 1112 10th St. SE, Cedar Rapids, Iowa.

4) The confidential informant has provided names, addresses, phone numbers, and types of vehicles of other persons who are selling heroin in the Cedar Rapids area. The informant has obtained information by personal con-

tact and association with these individuals. Your affiant, R. J. Smith, has verified this information through public records, information from the Cedar Rapids Metro Narcotics Unit, criminal history records and surveillance of the addresses provided and found this information accurate.

5) Your affiant, R. J. Smith, has established surveillance at 1112 10th St. SE, Cedar Rapids, Iowa, and has observed Cleo Luter enter and exit the building. Your affiant, R. J. Smith, has also observed known heroin users enter and exit the building, staying only a few minutes inside.

6) That a review of the Cedar Rapids City Assessors Records indicate that Cleo Luter is the owner of the residence at 1112 10th St. SE, Cedar Rapids, Iowa.

7) That a review of the records of the Cedar Rapids Police Department indicate that Cleo Luter was arrested March 10, 1978, for conspiracy to deliver heroin, charged dismissed; arrested June 10, 1980, delivery of a controlled substance, no disposition. (Continued on attached sheet). (sic)

WHEREFORE, the undersigned applies to John F. Siebenmann a Judge of the District Court of Linn County, Iowa, for a search warrant to be issued and the said residence be searched for said property.

/s/ R. J. Smith, R. Stephens, B. Kern

Subscribed and sworn to before me and in my presence by said R. J. Smith, R. Stephens, B. Kern this 23rd day of February 1982.

/s/ Denton Schultz
Notary Public
In and For Linn County, Iowa

I, John F. Siebenmann, hereby certify that in issuing the search warrant in this matter, I relied upon the foregoing sworn testimony of the foregoing applicant(s). In addition, I relied upon the sworn testimony of the persons whose names, addresses and an abstract of their sworn testimony, appears below.

R. J. Smith, sworn under oath, states informant has a prior record, was not under influence of alcohol or drugs at time info provided; is adult; that eight cases are still pending of arrests; no current charges are pending against informant, and that no promises of immunity were made to informant by officers.

/s/ John Siebenmann
Assoc. Judge of the District Court of Iowa

8:37 p.m.
2/23/82

I, John F. Siebenmann, hereby certify that in issuing the search warrant in this matter, the grounds for issuance of it is supplied by an informant who gave the information to Peace Officer R. J. Smith whose address is Cedar Rapids, Linn County, Iowa and I hereby certify and find that such informant had previously given reliable information.

/s/ John Siebenmann
Assoc. Judge of the District Court of Iowa

8) Your affiant, R. J. Smith, supervised a confidential informant while confidential informant and a known heroin user made a purchase of heroin from Cleo Luter at 1112 10th St., SE, Cedar Rapids, Iowa. On this occasion the confidential informant was searched and fitted with a body voice transmitter and provided with prerecorded serialized government funds for the purpose of purchasing heroin from Cleo Luter at his residence. The confidential informant met with the known heroin user and inquired of

the user where the informant could purchase heroin. The user indicated that the user had no heroin, and the user and the informant then travelled to the area of the Luter residence. The known heroin user was given the prerecorded serialized government funds and went to the Luter residence and returned to the informant, giving the informant the heroin purchased. Your affiant, R .J. Smith, Detective Bruce Kern and Lt. Denton Schultz monitored the conversation between the confidential informant and the known heroin user, at which time the known heroin user told the informant that the heroin had been purchased from Cleo Luter. The known heroin user was also overheard telling the informant that, "Cleo Luter has some good dope." Your affiant, Detective Bruce Kern, observed the known heroin user drive up to the Luter residence, exit the vehicle, and enter the fenced-in yard. The user then went to the rear of the residence, and returned to the vehicle shortly after. This purchase of heroin from the Luter residence occurred within the last 72 hours.

9) Your affiants, R. J. Smith, Bruce Kern, Richard Stephens, supervised and monitored the undercover purchase of heroin from Cleo Luter at the Players Palace Tavern at 321 9th Ave. SE, Cedar Rapids, Iowa on 2 occasions.

10) On one occasion at the Players Palace a confidential informant was searched and fitted with a body voice transmitter device and provided with prerecorded serialized government funds and then met with the known heroin user and inquired if the user had any heroin to sell. The user indicated that the user did not have any heroin. Then the informant accompanied the known heroin user to

the area of the Players Palace for the purpose of purchasing heroin from Cleo Luter. The known heroin user was observed by you affiant, R. J. Smith, exiting the vehicle and then entering the Players Palace and then returning shortly to the vehicle. Your affiant, R. J. Smith, then overheard the known heroin user telling the informant that, "Cleo sure has good dope. You know he has 2 kinds —the best for the Blacks and the other stuff for the Whites You know I always get the best." Your affiants, R. J. Smith, R. Stephens, and B. Kern, then followed the informant and the known heroin user away from the area. Your affiant, R .J. Smith, then met with the informant and received the heroin from the informant that was purchased from Cleo Luter by the known heroin user.

11) Your affiant, R. J. Smith, gave the aforementioned heroin received from the informant to Lt. Denton Schultz who in turn performed a narcotics field test on a sample of the said heroin for a positive reaction for an opiate.

12) During the undercover purchase of heroin from the Luter residence described in Paragraph 8, Cleo Luter's vehicle known to be used by Cleo Luter, a light beige 1979 Lincoln Versailles DQF119, registered to Gertrude Luter, was parked in the alley beside the residence.

13) During the undercover purchase of heroin at the Players Palace as described in Paragraph 10, a red and black 1970 Ford van, known to be used by Cleo Luter, was parked in front of the Players Palace, Iowa registration DF 1609, registered to Cleo Luter of 1112 10th St. SE, Cedar Rapids, Iowa.

14) Confidential informants and information received from the Cedar Rapids Metro Narcotics Unit indi-

cates that Cleo Luter uses the aforementioned 2 vehicles while trafficing in controlled substances.

15) The confidential informant mentioned in the aforementioned paragraphs has provided information in the past that has led to the arrest of 8 individuals on controlled substances charges.

* * *

APPENDIX G

SEARCH WARRANT

Search Warrant (Residence), filed 2/25/82

In The District Court of Iowa
in and for Linn County, Iowa

STATE OF IOWA

vs.

Cleo Luter and his residence at 1112 10th St. SE, and individuals unknown to the affiants by name and description at this residence, all located in Cedar Rapids, Linn County, Iowa,

Defendant.

SEARCH WARRANT

THE STATE OF IOWA

TO ANY PEACE OFFICER OF LINN COUNTY, IOWA

Proof having been this day made before me as provided by law that certain property is owned or possessed in violation of the laws of Iowa in said county, in the State of Iowa, in the place, building, and dependencies thereto described as follows: (Describe as set forth above.) Cleo Luter and his residence at 1112 10th St. SE, and individuals unknown to the affiants by name and description at this residence, all located in Cedar Rapids, Linn County, Iowa and occupied by and in possession of the person above named as defendant and being satisfied that the foregoing recital relative to said property is probably true, now, therefore, you are commanded to make immediate search of the premises and person above described and search for: Schedule I controlled substances, items to

manufacture controlled substances (adulterants and dilutents) such as Dorman, Lactose, and Mannitt, items such as scales, screens, spoons, and items for repackaging, finger stalls, and aluminum foil. Items to show constructive possession such as telephone records, utility records, personal letters, photographs, clothing, and such other controlled substances as listed in Chapter 204 Code of Iowa and if said property or any part thereof be found you are commanded to bring said property forthwith before me at my office.

Dated at Cedar Rapids, Iowa, this 23rd day of February, 1982.

/s/ John F. Siebenmann
Judge of the District Court of Iowa

8:48 p.m.
2/23/82

RETURN OF SERVICE

State of Iowa, Linn County, ss.

I, R. J. Smith, R. Stephens, B. Kern, being a peace officer in and for Linn County, State of Iowa, hereby certify that the within search warrant came into my hands on the 23 day of February, A.D. 1982, and on the 25 day of February, A.D., 1982, I executed said warrant by making a search of the premises therein described and found on the premises therein designated the following property, to-wit: (State kind and quantity): Heroin and paraphenelia for manufacture and resale and packaging for resale of controlled substances. Personal property including billfold, $319 in bills, 1 partial $1 bill, 1 partial $5 bill, $3.15 in change—Flite Kigg, 20 gauge Shotgun, 3199241 & H&R 20 gauge AT 239453, which said property I seized by virtue

of the within warrant and which I now hold subject to further orders of the court.

I have further executed the within warrant by giving a copy thereof, together with a receipt for the property taken to defendent. (sic)

No person having been found on the within premises, I have left a copy of the within warrant and a receipt for the property taken in the place where the property taken was found.

I, the officer by whom the annexed warrant was executed, do certify that the above inventory contains a true and detailed account of the property taken by me on the warrant, and was made publicly and in the presence of the person from whom taken.

Fees $_____

Services_____

Mileage_____

Cartage_____

R.J. Smith, R. Stephens, B. Kern

/s/ R. J. Smith

* * *

APPENDIX H

PROCEEDINGS ON MOTIONS, 10/29/82

(Appendix p. 56, Transcript p. 18) By the Court: For the record, is it your contention that this information is intentionally false, falsified?

By Mr. Braud: I would have to say yes. I don't like to say those things, but I think on behalf of my client, I have to say yes. I have not deposed Mr. Smith and I don't know him, and it makes it difficult to make a determination, but assuming he is a trained, skilled officer, he has to know the difference, and I would have to answer yes.

By the Court: All right.

APPENDIX I

SUPPLEMENT TO DEFENDANT'S MOTION TO SUPPRESS, FILED 11/22/82

Comes now the Defendant, CLEO LUTER, by and through his attorneys, BRAUD, WARNER, NEPPL & WESTENSEE, LTD., and in a supplement to his Motion to Suppress Evidence Seized pursuant to a search warrant, states to the Court as follows:

1. That the information provided to the Magistrate did not adequately inform the Magistrate of the true status of the case, i.e., that the hearsay information upon which the search warrant was based was the information provided by the user.

2. That the warrant is defective and should be quashed in that the *Aguilar* and *Spinnelli* requirement of liability are not met within the four corners of the warrant, as those requirements are applied to the user.

3. That user is the actual informant in the case.

WHEREFORE, for the foregoing reasons the Defendant respectfully prays that these matters be considered along with the pending motion and that the warrant herein be dismissed and any evidence seized as a result thereof be quashed.

CLEO LUTER,

• • •

APPENDIX J

PRETRIAL PROCEEDINGS, 11/15/82

(Appendix p. 131, Transcript p. 55) Mr. Braud: Okay. We would ask that the motion to suppress include all grounds previously stated, and specifically assert that the suppression should be allowed because the warrant itself and the evidence in support thereof would indicate a violation of Article I, Sections 8, 9 and 10 of the Iowa State Constitution as well as Amendments 4, 6 and 14 of the United States Constitution. That would be true with respect to the search of the residence and the search of the vehicle operated by the defendant on the date of the sizure. We would ask that the brief be made a part of the motion, and (Appendix p. 132, Transcript p. 56) specifically that the motion also would include the allegation that the certifying magistrate was not provided with material facts, particularly those material facts showing the unreliability of the user; that the reliability tests that may or may not be applicable whereby the sufficiency of the presentation by the informant might stand would not apply to the user, but that certain material facts which go directly to the reliability of that user were deliberately and falsely withheld from the magistrate, and as a consequence the determination by the magistrate that the search was proper was in error and should be overruled. And more specifically, we would ask that the Court incorporate the brief which I think is more thorough.

• • •

(Appendix p. 133, Transcript p. 57) The Court: Okay. The State's objections are all overruled. Mr. Braud's

motion to suppress is submitted. The brief can be part of the motion. Do you have anything further, Mr. Braud?

Mr. Braud: No, Your Honor.

* * *

APPENDIX K

PRETRIAL PROCEEDINGS, 11/15/82

(Request for Disclosure of Drug User/Informant)

(Appendix p. 139, Transcript p. 63) Mr. Braud: We yesterday again asked the prosecution for the production of the name of the user, and possibly we could stipulate, but in any event, I believe that if we were (Appendix p. 140, Transcript p. 64) required to produce the evidence, and we did have the question certified. I might just give that to the Court. We could have it marked subsequently. We asked the prosecutor two questions. We asked the witness, R. J. Smith, two questions which he refused to answer on the instructions of the State. The first one is the one that we're most concerned about, and that is, "What is the user's name?" The objection, as I understand it, is that the disclosure of the user may somehow lead to the disclosure of the informant. But as the Court now knows from the testimony of Mr. Smith, the user's, Number One, a material witness; Number Two, he is not a confidential informant; Number Three, he has not served as a confidential employee, and we submit that he is not protected by any rules of evidence. He is certainly a material witness. His statements are within the 72-hour period and are res judicata statements. We're entitled to confront that witness. We would be denied our rights to effective assistance of counsel under the Sixth Amendment unless we could confront that witness. We would ask that the State immediately provide us with sufficient information to locate and have this witness available for this trial. We're not asking for a continuance. We will

take whatever is necessary to get this person here, once he is identified.

* * *

(Appendix p. 145, Transcript p. 65) Mr. Braud: We'd like to add that the motion is grounded in the Fourteenth Amendment as well, so that it applies to a State action. Mr. Dillard, do you agree for purposes of making the record complete that the request for the production of the witness has been made and that you have refused to provide it on the grounds that you've given?

Mr. Dillard: I think that's in the record.

The Court: When was the request made?

Mr. Braud: The first time the request was made was when the other police officers were interviewed. But the request that I'm referring to now is the request was made after I spoke to Mr. Smith. I would advise the Court that the previous witnesses all have said that Mr. Smith is the main agent. He's the one that kept the notes and knew everything about this case, and all of their information was sketchy, and that he was the person who really knew what was going on in this case. So we've had to sort of keep things on the back burner until we were able to depose Mr. Smith. Mr. Smith does (Appendix p. 142, Transcript, p. 66) have this information, and at least I believe he has this information. But, of course, he refused to provide it based on statements of counsel for the State.

The Court: And your theory, Mr. Dillard, is that you don't have to disclose the name of the confidential informant?

Mr. Dillard: That's correct.

The Court: But this user is not a confidential informant; is that correct?

Mr. Dillard: That's correct.

The Court: It will be the ruling of the Court that the County Attorney can—or shall turn over to the defendant the name of the user as requested.

Mr. Dillard: Well, let me just state for the record that that ruling is a—gives us a good example why I wish we would have handled these matters prior to selection of a jury. The Court's ruling is such that I now have to ask for a delay prior to the commencement of the evidence in this case, because I need to confer with the County Attorney and to confer with my witnesses, and I'll have to ask for, I believe, a continuance until 1:30 at least.

* * *

(Appendix p. 144, Transcript p. 68) The Court: Okay. Let the record show that we're appearing in judge's chambers in this case out of the presence of the jury in the case of State of Iowa vs. Cleo Luter, No. CRF 7256. Appearing in person is the defendant with his attorneys, Mr. Braud, Mr. Kinnamon, Jon Kinnamon, and Mr. Jamison. Appearing on behalf of the State of Iowa is Assistant County Attorney Denver Dillard. We're appearing here in chambers to have a hearing on the defendant's motion that the State disclose the name of a—what has been referred to as a user whose participation in this case, as I understand it, was limited to the securing of the search warrant. Okay. The Court had made a preliminary ruling on this matter, and we're now having this hearing, and the Court has asked both the defendant—the attorney for the defendant and the State to present authority on this

point, which both parties have done. Mr. Braud, you may proceed to make any record you want to make at this period.

Mr. Braud: Thank you, Your Honor. I'd like to first address myself to the scope of the considerations involved. We had certified two questions. One with regard to the user and one with regard to the informant. And I believe that the (Appendix p. 145, Transcript p. 69) cases that we're referring to and the tests involved apply equally to each of them, although the strength of the considerations weighs more heavily on the user than the confidential informant.

Now I believe that we probably would all agree from the presentations that have already been made that the user purportedly went into the house after having some type of transaction with the informer, and then after leaving the house on the date in question had a further conversation or transaction with the informer, and then subsequently a search warrant was obtained. This occurring a day or two prior to the arrest of the defendant.

We've heard today from Mr. Smith, who has testified as to some statements that he alleges were made by the user about having good dope or some other such statment. And we suggest the following: That the State has steadfastly, Number One, refused to produce either the identity of the user or the informer. As to the informer, they just say that he's privileged and they don't have to produce him. As to the user, they allege that to disclose the user would indirectly expose the informer, and thus in some sort of fruit of the protected tree, the user is thus protected. We suggest that keeping either of those witnesses

from us will prevent us from properly defending Mr. Luter and from confronting the witnesses in this case. We've already indicated which statutory rights (Appendix p. 146, Transcript p. 70) we feel would be violated in that respect.

First, with respect to the Fourth Amendment claims, which is the search and seizure claims, if we are, and we are, alleging that the police officers deliberately or falsely misled the magistrate in the presentation of evidence, one, by either stating something that they knew to be false or, secondly, willfully failing to present material facts, which would in all likelihood have altered the magistrate's judgment had the magistrate had those facts before him, and concealing those facts, which is another version of false presentation. The one absolutely essential witness to that transaction is the user, as he is the only person who really, from what we know, from what little we know, is in a position to say that something did or did not happen. The other only conceivable person, of course, would be the defendant, who has no obligation whatsoever to come forward.

We have, Your Honor, in this case no evidence before us nor any way to put evidence before us as to what did or did not occur in that house. Now, one of the cases that the State has submitted, which is State vs. Valde, addresses itself to that question, and just in the headnotes where it states that the issuing magistrate—strike that. The statutory requirement that the issuing magistrate furnish names and addresses of sources on application for search warrant was not absolute. Facts could be supplied wholly by an undisclosed informant, (Appendix p. 147, Transcript p. 71) which I would contend that that would refer either

to the informant in this case or the user, if there was a secondary guarantee of trustworthiness, such as proof of the person's reliability or corroborating details furnished by the applicant for the warrant. Now, none of those things exist in this case. There's been no establishment of the reliability of the user. There's been some effort to show a reliability of the informant, but the informant has not acted as an informant in this case because he has no direct information himself. He is trying to submit secondhand information, the reliability of which would depend on the user.

So as to the Fourth Amendment claims, our defense is materially hampered by the absence of the user and to a lesser degree, but substantial degree, also the informant, who also is in a good position to say any one of a number of things. For instance, we, of course, don't know what the user would say. But presumably he might say that Mr. Luter wasn't there. Presumably, he might say that when he went to the house, nobody was there. He might say he didn't go into the house. He might say that he had been contacted by the informant and he and the informant got together and cooked up this deal so that they could pocket the money. These things are not in the least unheard of when we're dealing with narcotics addicts as the user has been identified in this case. And we know there's no reliability because Mr. Smith has so testified (Appendix p. 148, Transcript p. 72) that there was no control or other of the type of reliable factors. No previous testimony which resulted in a conviction. He was not on the payroll. They didn't search him and so on and so forth. So we know that he's unreliable. We know that as a narcotics addict his testimony is suspect, his state-

ments are suspect, and we know that he is the only person upon which the search—basis for the search warrant was issued. And so I contend that as to the Fourth Amendment claims, he's absolutely an essential witness and should be produced.

Now, I offered this morning and continue to make the same suggestion. I recognize that this case has been somewhat delayed. I'm not interested in having a continuance or anything else. And upon proper identification of the user, you know, I will take the burden of getting the investigator and trying to find him and take the statement. Obviously run the risk in taking the statement that the statement isn't favorable to me. That's the risk I run. But at least my client is entitled to an opportunity to investigate the facts to determine whether or not he can properly amplify his defense on the Fourth Amendment claims.

Now, with respect to the trial itself, whether or not the Government listed the user and the informant as witnesses does not make them witnesses or not. This case is a case wherein the defendant is charged with the greater offense, which by (Appendix p. 149, Transcript p. 73) statute includes the lesser offenses. You know, I'm not telling Mr. Dillard anything he doesn't already know from great experience. You know, there's going to be some testimony in this case from the Government certainly as to what does it mean to have these things in your possession. Does it mean that you intended to deliver them? That's the burden that they have in this case.

Now, the other side of delivery is use. This whole question of use has a lot to do with what the user, who at least from what little we're able to get because they

won't disclose the information to us, is a very recent occupant in the house. Did he see Mr. Luter using these things? For instance, one of the things that are on the list of things to be introduced is a tray with residue of cocaine. Did the user use those narcotics? Did the user see any narcotics? What was the user's involvement and what were his observations with relation to the things that were seized immediately or as soon as a warrant could be obtained and the seizure could be made, based on this user's observations. So my argument is both the informant, but much more so the user, are very much involved in this transaction. They are across the board involved in the entire process of the case, including the search and seizure, which could not have been obtained except for their testimony or purported testimony. We don't know that in fact there is this testimony, because that's only been repeated (Appendix p. 150, Transcript p. 74) to us by people who are at a double hearsay stance. So I think we have an opportunity to contest it on the Fourth Amendment ground and we have a right to have them here to confront them for purposes of this trial. And I would like for the Court to order that the State produce them.

Now, I feel that there's only one legitimate defense to the production of material witnesses, be they informants or otherwise, and that is a threat to the safety of the informant. And absent Mr. Dillard coming in with some reliable, believable testimony that that kind of threat exists, then I don't think there's any balancing on the behalf of the State that would permit us to be prohibited from using our rights to confront these witnesses. That's my argument.

* * *

(Appendix p. 154, Transcript p. 78) The Court: But I wanted at this hearing to give the defendant and the State an opportunity to present any evidence you want to also. Mr. Braud, did you have any evidence you wanted to present at this hearing?

CLEO LUTER,

the defendant, called as a witness in his own behalf, being previously sworn by the Court, testified as follows:

Direct Examination

By Mr. Braud:

Q. You were already sworn in this morning. State your name, please.

A. Cleo Luter.

The Court: Okay. Mr. Luter, you're still under oath.

Q. Mr. Luter, have you had at least some idea who the informants might be?

A. Yeah.

Q. You don't know specifically but you could narrow it down—

A. Right.

Q. —between maybe five people?

A. Right.

Q. Have you attempted in any way to contact those people?

A. No.

(Appendix p. 155, Transcript p. 79) Q. Or had anyone else contact them?

A. No.

Q. Has anybody accused you of trying to harm any witnesses?

A. No.

Q. Or take any action against anybody?

A. No.

Q. At any time?

A. No, sir.

Mr. Braud: No further evidence, Your Honor.

• • •

(Appendix p. 156, Transcript p. 80) Mr. Braud: I have a suggestion along those lines too. I don't know what the five names are, but I suggest maybe we could resolve this issue by having him give whatever names he has and you give your names to the Judge in camera, and if they match up, then give us the names and let us do our investigation tonight.

Mr. Dillard: Well, I would not be willing to do that.

Mr. Braud: Well, there's no point in just you fishing around just for the sake of fishing around.

Mr. Dillard: Well, you've placed his testimony into evidence.

Mr. Braud: Only for one limited purpose. To show he has not been and is not a threat and to offset, even though you have failed to introduce any evidence of a

threat, which I believe is required, that you have attempted, I think, to load th deck somewhat by saying that if you wanted to you could call somebody to testify and they would say that on some (Appendix p. 157, Transcript p. 81) other occasions in other situations some informant, who is as yet unnamed and in some other case, might have been given a hot shot. I don't think that has any real effect here, but the only purpose of my client's testimony is to go on record that he has not and is not a threat to anybody. Now, as to what these names are, that's just for your own investigation, which I don't think is material to anything.

Mr. Dillard: Well, I think it to some extent tests the credibility of the witness's testimony that's been presented here.

Mr. Braud: Sure, if you plan to go out and talk to those witnesses to see if in fact he did contact them. If that's your purpose, I have no objection. But I think that you ought to give your names to the Judge and the Judge ought to decide whether we're entitled to the same kind of treatment.

* * *

(Appendix p. 158, Transcript p. 82) Mr. Braud: I wanted just to respond finally in (Appendix p. 159, Transcript p. 83) comment to counsel's remark concerning the involvement of the informant. I mean, it's clear from counsel's argument that this entire case rests upon the credibility of the user and not the informant. It is now clear that from the statements just made by the State that there is an attempt to establish the reliability of the user by saying that he made a double hearsay statement

to the informant that, "I don't have any heroin." Then he went into the house and later he came out and he did have some heroin, and that that is in effect a controlled buy and therefore the reliability exists.

The Court knows that the reliability tests are very similar to the ones the State just told us, that is, that there have been previous prosecutions in the past which resulted from accurate information that had been provided and so forth. But more importantly than that, even if this was a private citizen who was not hobbled by having a felony conviction and therefore, quotes, unreliable, even if it was a private citizen who had made the statements and the transactions, for purposes of probable cause, we would still need some corroboration.

The corroboration in this case—you see, the problem here is we have no way whatsoever to tell whether or not the heroin that was ultimately taken from the informant by the police was the heroin that belonged to the user, whether he got it from inside of the house or outside of the house or had it in his pocket. We don't know where he got it from. We don't (Appendix p. 160, Transcript p. 84) know what happened to the money. You know, counsel made the gratuitous statement that the evidence shows that the money was given to Cleo Luter, but that is not in the four corners of the warrant anywhere. There is nothing that states what happened to the money. We can only guess and speculate what happens to the money even if he were credible. There is no control in this case.

Now, the user is the primary source of the defendant's problems in this case and is a transactional witness, and I think that we're just absolutely entitled to interview

this witness, and if necessary and appropriate, to subpoena him for process and to have him testify before this court, hopefully before these proceedings end.

The Court: Okay. Anything further then?

Mr. Braud: No, Your Honor.

The Court: Okay. The Court will make the following findings in this case: The informant and the user in this case are not witnesses nor are they participants in the crimes for which the defendant is on trial at this time. They are only participants in the securing of the search warrant against the defendant. A search warrant hearing was held on June 14, and the warrant was upheld by this Court. A search warrant hearing was also held this morning and the warrant was upheld. And now we have some additional problems raised in regard to the search warrant.

(Appendix p. 161, Transcript p. 85) The Court further finds that in this case the public interest in protecting the flow of material information to the State's law enforcement agencies outbalances the need for disclosure to defendant of the informant or the user. The user, the Court considers to also be an informant.

When all the facts shown by the present record are considered, and in light of all the authorities cited by the State and also the authorities cited by the defendant, and specifically the case of State vs. Sheffey, cited as 243 N.W. 2d 555, it's the order of the Court that the defendant's application for disclosure of the informant and the defendant's application for disclosure of the user in this case are overruled, and the certified questions are therefore answered in that respect.

• • •

APPENDIX L

MOTION FOR DIRECTED VERDICT AT CLOSE OF ALL EVIDENCE 11/19/82

(Appendix p. 648, Transcript p. 599) • • •

Mr. Braud: We would at this time, Your Honor, ask the Court to direct a verdict, dismiss the cause, or otherwise cause the judgment in this case to be for the defendant on each of the counts. We'd make two separate arguments, one argument referring to Counts I and III of the controlled substances counts, and the other argument directed towards Count II, or the gun charge.

With respect to Counts I and III, the Court will recall that the defendant was charged in both of those counts with the delivery—with the possession of controlled substances with the intent to deliver. The motion herein is based on the Fourteenth Amendment to the Constitution, the United States Constitution, the Sixth Amendment of the United States Constitution, Fifth Amendment of the United States Constitution, the Fourth Amendment to the United States Constitution, as well as the section 10A of the Iowa Rules of Criminal Procedure, Rule 10A.

The evidence in this case taken in a light most favorable to the Government can only show that there was a mere possibility that the possession existed with intent to deliver. I believe that as a matter of law the evidence is insufficient to generate a jury question on the issue of intent to deliver. (Appendix p. 649, Transcript p. 600). The only evidence, all of which was timely objected to, on the issue of intent was the paraphernalia found in the house, none of which has been connected in this case in any direct way to the substances which were either ad-

mitted to have been in the possession of the defendant or were attempted to be placed in the possession of the defendant in a constructive way, that is, Exhibits C and D which the defendant admits possessing, or Exhibit Q, which the defendant denies possessing, but was found in the house. Absent additional evidence, statements by witnesses, some other strong circumstantial link, for instance, fingerprints, matching of substances, contents, the jury should not be permitted to speculate as to what the defendant's intent might have been nor can the defendant's intentions be proven by statements by counsel that didn't he intend to sell these drugs at the Player's Palace as he had before and those sort of things.

In short, there's insufficient proof in this case. I would ask the Court to consider the case of In re Winship at 897 U.S. 358, 1970 case. We have it at 897, but it should be 397. I'd also ask the Court to consider United States vs. Jones, 418 F.2d 818. It's an Eighth Circuit case, 1969. And just briefly, the substance of that case requires that the lesser offense—that the judgment be on the lesser offense if the evidence is such that either one of those can be reached evenly, that is, if in considering all the evidence it (Appendix p. 650, Transcript p. 601) is equally likely that the lesser offense should be found as opposed to the greater, and there must be an acquittal on the greater and judgment for the lesser. It's in fact almost a mandatory type judgment for the defendant. It's a presumption in favor of the lesser offense for the defendant where the evidence is equally balanced. And I'm submitting to the Court in this case it's not even equally balanced. There's no real probative evidence of intent to deliver. There's just a lot of mud on the wall, if you will.

* * *

NO. 83-2016

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CLEO LUTER,

Petitioner,

vs.

STATE OF IOWA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

FORM STATEMENT

The requirements of Supreme Court Rule 34.1(a), (b), (d), (e) and (f) and the statement of the case are omitted as permitted by Supreme Court Rule 34.2.

REASONS FOR DENYING THE CERTIORARI

I.

The Iowa Supreme Court's finding that the Federal Constitution did not require disclosure of the identity of an individual who participated in drug buy transactions which were unrelated to charges at trial and which were monitored by undercover agents whose observations thereof provided only the basis for probable cause for issuance of search warrants and not the charge at trial, presents no undecided federal question, is not in conflict with prior decisions of this Court, and was justified on the facts.

Search warrants were applied for on the Petitioner, two vehicles, and defendant's home. The supporting affidavits were the same for each application. The supporting affidavits established that the affiant, D.C.I. Agent J. R. Smith, supervised a confidential informant and a known heroin user (Hereinafter, User) who purchased heroin from Petitioner on several separate occasions both at Petitioner's business and residence. In each instance, the confidential informant was fitted with a body voice transmitter and provided with funds for the purpose of purchasing heroin. With respect to the heroin purchase at the residence, Informant and User met; there was conversation between User and Informant in which the purchase of heroin from Luter was discussed including User's statement that"Cleo sure has good dope . . . ."; User was observed driving to the

Luter residence, exiting the vehicle, going to the rear of the residence, and returning to the vehicle within a short time. User returned to Informant and the affiants monitored the conversation while User gave Informant the heroin. A field test indicated the substance purchased by Informant was heroin. The affidavits contained similar observations made by the affiants in connection with the supervised purchases of heroin which occurred at the defendant's place of business.

In addition to the agents' personal observations, the affidavit established that the Confidential Informant told the agents that he had previously purchased heroin from defendant at defendant's residence. Moreover, the affiants attested to the fact that Informant had previously supplied reliable information which had led to several arrests and convictions. Search warrants

were issued February 23, 1982. The warrants were executed on February 25, 1982. Quantities of heroin and cocaine as well as items of drug paraphernalia were seized from Luter's home and car. Luter was arrested and charged with possession with the intent to deliver controlled substances in violation of Iowa Code § 204.401 (1981).

Luter filed pretrial motions to suppress the seized items and compel disclosure of the identities of Informant and User. The trial court overruled these motions. Luter was convicted of Possession with Intent. The Iowa Supreme Court affirmed the conviction.

The first question Petitioner presents for review concerns disclosure of an informant's identity. This issue is two-pronged, each prong requiring separate considerations. However, each aspect of this issue can be resolved through application of existing decisions by this Court.

A. Disclosure of the Informer's identity was not constitutionally mandated for a fair adjudication of Defendant's fourth amendment attack upon the search warrant.

Iowa recognizes the "Informer's Privilege." That is, as a general rule, the State is privileged to withhold the identity of a person who furnishes information relating to violations of the law.[1] See, e.g., State v. Webb, 309 N.W.2d 404, 410 (Iowa 1981). This Court has held "where the disclosure of an informer's identity . . . is

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[1]Whether or not the User falls within the general scope of the informer privilege is not at issue because it was determined that disclosure of User would lead to the disclosure of Informant.

The Iowa Supreme Court accorded User Informant status for two reasons: First, in fact the user was a part of Agent Smith's apparatus for obtaining a buy and was actually an extension of the informant himself; and second, revelation of the user's identity, if known, would seriously jeopardize the informant's anonymity contrary to the rationale of the informant privilege.

relevant and helpful to the defense of accused, or is essential to a fair determination of a cause, the privilege must give way. Roviaro v. United States, 353 U.S. 53, 60-62, 77 S.Ct. 623, 624, 1 L. Ed. 2d 639, 645 (1957). However, this Court has refused to hold that the Federal Constitution requires a State to abolish the Informer's privilege from its law of evidence, and to disclose the informer's identity in every such preliminary hearing where it appears that the officers made arrest or search in reliance upon facts supplied by an informant they had reason to trust." McCray v. Illinois, 386 U.S. 300, 312, 87 S. Ct. 1056, 18 L. Ed. 2d 62, 71 (1967). See also Colorado v. Nunez, ___ U.S. ___, 104 S. Ct. ___, 79 L. Ed. 2d 338, 341 (1984).

Concededly, the question, whether a reviewing court must ever require a revelation of the identity of an informant

once a substantial preliminary showing of falsity has been made, remains undecided by this Court. Franks v. Delaware, 428 U.S. 154, 170, 98 S. Ct. 2674, 57 L. Ed. 2d 667, 683. The facts of this case, however, cannot provide a vehicle for resolution of that question. Prior to trial, Luter attempted to assault the veracity of the affiants by alleging a "material omission" because no underlying facts concerning User's reliability were set forth. However, the primary basis for the search warrant was not hearsay information but the observations of the agents. Thus, this aspect of Petitioner's first issue is clearly controlled by existing decisions of this Court and provides no opportunity for this Court to address any undecided important question of federal law. Clearly, where the "legality of officers' action does not depend upon the credibility of something told but

upon what they saw and heard," disclosure of an informant is not required. Scher v. United States, 305 U.S. 251, 254, 59 S. Ct. ___, 83 L. Ed. 151, 154 (1938).

B. Disclosure is not constitutionally required in this case as a means for defending against the charge at trial.

Identity of an informer must be disclosed whenever the informer's testimony may be relevant and helpful to the defense. Roviaro v. United States, 353 U.S. at 60-61, 77 S. Ct. at 638, 1 L. Ed. 2d at 645. That determination depends on the "circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." Id.

Petitioner's characterization of user as a "res gestae" witness is inappropriate. The transaction in which User participated occurred prior to the date of the crime and

formed only the basis for the search warrant. Luter was charged with possession with intent to deliver a controlled substance in violation of Iowa Code § 204.401 (1981) on February 25, 1982. The transaction involving Informant and User was not related to the charges filed against Luter. Indeed, there was no evidence of the User transactions introduced at trial. In Iowa, crimes of Possession are time specific crimes. Cf. State v. Post, 286 N.W.2d 194, 202 (Iowa 1979). Thus, User's observations on a date not in question are not material and, therefore, unnecessary to Luter for use in defending against the charge at trial. The second prong of Petitioner's first issue also presents no undecided federal question of importance, and the Iowa Supreme Court's finding is justified on the facts of this case.

II.

The Iowa Supreme Court's finding that probable cause existed for issuance of the search warrants is not in conflict with prior decisions of this Court and was justified on the facts of this case.

In assessing the existence of probable cause for a search warrant, the issuing magistrate must make a practical, common sense decision whether given the totality of the circumstances set forth in the affidavit before him, "including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, ___ U.S. ___, ___, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 526, 548 (1983). Thus, the rigid two-pronged test under Aguilar and Spinelli upon which

defendant relies, has been abandoned, and the "totality of the circumstances" approach that has traditionally been utilized for probable cause determinations has been substituted in its place. Id. at 548. An informant's "veracity," "reliability," and "basis of knowledge" should be utilized only to the extent that they "may usefully illuminate the common-sense, practical question concerning probable cause." Id. The "duty of a reviewing court is simply to insure that the magistrate had a 'substantial basis for . . . concluding' that probable cause existed." Id.

Application of the above-stated principles to the facts set forth supra, demonstrates that the magistrate clearly had a substantial basis for concluding that probable cause existed.

In addition to the facts set forth in Division I, the affidavits also provided the

judge with information that heroin had been purchased at Luter's business and at his residence, from which the judge could infer drug operations at both sites. Affiants further swore that the van was "known to be used by Cleo Luter" and was in front of Players Palace [Luter's business] when the user bought heroin there; and the Lincoln was likewise "known to be used by Cleo Luter" and was beside Luter's residence when the user bought heroin at that place. The judge could reasonably infer that drugs were probably transported between Luter's two places, the Palace and the residence, and that they were transported in one or both of the vehicles.

Luter's appellate attack on the showing of probable cause was also premised upon an alleged failure to set forth facts establishing the reliability of the "User." Under the standards articulated in Spinelli v. United States, 393 U.S. 410, 89 S. Ct.

584, 21 L. Ed. 2d 637 (1969) and Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L. Ed. 2d 723 (1964), reliability of an informant is relevant only when probable cause is sought to be established by hearsay information of an unidentified informant. Although the drug purchases, which were monitored, involved statements by the User, it is not these statements which provided the probable cause. Rather, probable cause was premised upon the affiant's observations of the drug transactions at Luter's home and business.

Even assuming that User's statements that "Luter has good dope" etc. are necessary to provide sufficient probable cause, no further showing of reliability is needed. As discussed above, rigid adherence to the Aguilar-Spinelli two-pronged test is no longer required for determination of probable cause where hearsay information provides the

basis for the search warrant. Gates, ___ U.S. at ___, 103 S. Ct. at 2332, 76 L. Ed. 2d at 548. Rather, probable cause is evaluated in light of the totality of the circumstances. Id. User's statements were reliable given the circumstances under which they were made.

Under the totality of the circumstances, the affidavits clearly established probable cause to believe evidence of possession of controlled substances could be located on Luter's person, in his home, and in his vehicles.[2]

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[2]Even assuming arguendo that this Court determined that probable cause for the search warrants did not exist, Petitioner would still not be entitled to suppression of the evidence seized. The Court recently held that the exclusionary rule should not be applied so as to bar the use at trial of evidence obtained by officer's acting in reasonable reliance on a search warrant issued by a detatched and neutral magistrate but ultimately found to be invalid. United States v. Leon, ___ U.S. ___ (7/5/84 Sup. Ct. No. 82-177). There can be no question whether the officer's reliance was

Defendant also assails the search warrant on the ground that it was obtained by false information. He alleges that the statement that the confidential informant was reliable was misleading in that the officer had no basis for determining the reliability of the User. To prevail on this claim, defendant is required to show not only that the challenged statements were false, but that the statements were intentionally false or made with reckless disregard for their truth or falsity. See Franks v. Delaware, 438 U.S. 154, 171-72, 98 S. Ct. 2674, 57 L. Ed. 2d 667, 682 (1978).

Defendant initially fails to show that any statements were "false" within the contemplation of the Franks rule. A "false" statement is one which leads to a

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2 continued.
reasonable. Indeed, not only did the magistrate determine there was probable but likewise did the Iowa district court and the Iowa Supreme Court.

misconception. Id. "Under proper facts, a failure to disclose information to an issuing judicial officer can constitute misrepresentation . . . 'provided that the omission produces the same practical effect as does an affirmative statement . . .'" Id. Suppression is not justified when factual misrepresentation in the application is immaterial and does not affect the issuance of the warrant. Id. No statement concerning the reliability of the User was made. Luter draws the imaginative inference that the officers intended that no evaluation of the User's reliability be made by the magistrate in order to mislead the magistrate. Such a claim is absurd. It is far more likely that the reliability of the User was not discussed because it was not at issue.[3] Accordingly, any statement

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[3]As the Iowa Supreme Court noted, if the officers were inclined to fabricate, "why would they invent such an involved event for their informations?"

regarding the reliability of the Informant or the User was absolutely immaterial inasmuch as probable cause did not derive from hearsay information as discussed above.

Thus, the Iowa Supreme Court's finding that probable cause existed is not in conflict with prior decisions of this Court.

III.

The Iowa Supreme Court properly applied this Court's standards for reviewing appellate attacks upon the sufficiency of the evidence and determine that the evidence was sufficient to sustain Petitioner's conviction for possession with intent to deliver a controlled substance in violation of Iowa Code § 204.401 (1981).

This Court has clearly set forth the standards governing appellate attacks upon the sufficiency of the evidence to sustain a conviction:

> . . . . [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. . . . . This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution.

Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560, 573 (1978)(Citations omitted).

The crucial factual dispute involved the sufficiency of the evidence to support a finding that Luter intended to deliver. This issue must be determined in light of applicable state law. Id. at 325.

Intent is rarely capable of direct proof and therefore, the factfinder may determine intent by "such reasonable inferences and deductions as may be drawn from the facts proved by the evidence in accordance with common experience and observation." State v. Serr, 322 N.W.2d 96, 101 (Iowa Ct. App. 1982). Intent to deliver may be inferred from the manner in which the substance is packaged; presence of weighing or measuring devices; presence of other paraphernalia commonly utilized in drug dealing. See State v. TeBockhorst, 305 N.W.2d 705, 708 (Iowa 1981); State v. Birkestrand, 239 N.W.2d 353, 363 (Iowa 1976); State v. Boyd, 224 N.W.2d 609, 612-613 (Iowa 1978).

The State presented testimony that pursuant to the execution of search warrants two film cannisters, which had been observed in defendant's car, were recovered from defendant's yard and a neighboring yard after police officers observed defendant throw them as he exited his home. Agent Smith testified that after seizing the film cannisters (Trial Exhibits C and D) he opened them and observed that exhibit C contained a finger cot (used for repackaging heroin/cocaine), "pills" (a folded piece of tin foil with a small amount of heroin), magazine papers, and "sno-seal" (a common heroin packaging device). Agent Smith further testified that Exhibit D also contained finger stalls and foils. Exhibits C and D were admitted into evidence. All of the containers in exhibit D contained heroin. Four of the finger cots in exhibit C contained cocaine, and one of the finger cots contained heroin. The combined weight of the

powders containing heroin was approximately five grams, and the combined weight of the powders containing cocaine was slightly less than five grams.

Defendant places undue significance upon testimony indicating that the quantity of these substances was not necessarily consistent or inconsistent with either possession for personal use or possession for delivery. Any emphasis upon that testimony is misplaced because the inference of intent to deliver under the facts of thiscase derives not from the quantity of the drugs but from the plethora of weighing, measuring, mixing, cutting, and packaging devices which were also seized from defendant's home--many of these devices containing residue of heroin and cocaine.

Officers searched all of the rooms of defendant's house. On a coffee table in the living room, officers discovered a glass

vial, a spoon, a sealed bag that had been opened, a sifter, sno-seals, finger cots, and a gram scale. The plastic bag and the glass bottle were tested by the D.C.I. and determined to have a residue of cocaine. The spoon was also observed to have a residue on it, although it was an insufficient amount to test. Defendant contends these items cannot imply an intent to deliver because they have ordinary household uses. Defendant's argument, however, overlooks the circumstances surrounding these objects: they were all on the coffee table in the living room, an unlikely place for such household objects; and some of the items contained cocaine residue. Such circumstances are clearly inconsistent with the ordinary use of these items.

A search of the first floor utility room yielded a finger cot, strainer, bottle labeled "Pseudo-caine," a single playing

card, a sno-seal, and magazine pages cut into squares. These items are also consistent with preparation of drugs for delivery. Pseudo-caine is a steeping agent used in cutting cocaine; magazine papers are folded to hold cocaine.

In the kitchen area officers discovered a bottle labeled "Dormin" containing capsules, and an empty Dormin bottle was found in the kitchen wastebasket. Dormin is commonly used to extend heroin. Also in the kitchen, officers discovered more finger cots, plastic bags, and a bottle of Quinine Hydrochloride. One of the finger cots was determined to contain heroin residue. Quinine Hydrochloride is a chemical which is used to extend heroin.

Other items such as a mirror, razor blades with cocaine residue, and an additional gram scale were recovered from defendant's home. Testimony indicated that

all of these items have uses consistent wth processing cocaine and heroin for delivery.

In sum, many of the items relied upon by the State have ordinary uses. However, many of these items were found to contain residue of cocaine or heroin, thus negating "ordinary" or non-drug related usage. Furthermore, many of these "ordinary" items were found in close proximity to clearly drug-packaging items such as finger cots and chemical extenders such as Dormin, Psuedo-caine, and Quinine Hydrochloride. The Iowa Supreme Court properly found that a rational jury could have concluded beyond a reasonable doubt that Luter's possession of both heroin and cocaine was with the intent to deliver.

CONCLUSION

The writ of certiorari should be denied and the petition dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certify that on the 12th day of July, 1984, three copies of the foregoing document were deposited in a United States Post Office mailbox, with postage prepaid, and addressed to counsel for the petitioner:

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The undersigned further certify that all parties required to be served have been served.

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